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# THE RISE AND FALL OF FAIR USE THE PROTECTION OF LITERARY MATERIALS AGAINST COPYRIGHT INFRINGEMENT BY NEW AND DEVELOPING MEDIA

HUGH J. CROSSLAND\*

*St. Columba, sitting up all night to do it, furtively made a copy of abbot Fennian's Psalter, and how the abbot protested as loudly as if he had been a member of the Stationers Company, and brought an action in detinue, or its Irish equivalent, for Columba's copy, and how King Diarmid sitting in Tara's halls, not then deserted, gave judgment for the abbot . . . †*

## I. INTRODUCTION

Many copies of literary material—books and periodicals—have been made in violation of the law. The growing use<sup>1</sup> of copying machines is causing a decline in the market for literature, is unfair competition<sup>2</sup> to the publisher and copyright owner, and has possible constitutional significance.<sup>3</sup> Although the copyright statute<sup>4</sup> grants absolute rights<sup>5</sup> protecting writings that are published in accordance with its provisions,<sup>6</sup> the courts have put a gloss on the statute by allowing non-infringing

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† BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 42 (1899).

1. The Wall Street Journal, June 13, 1963, at 24, col. 2 carried this news and a gloomy forecast for the future that is now upon us:

Well over 300 million high speed copies of various published material are made each month in the U.S., one maker of such machines estimates. That's some 50% more than were produced monthly as recently as 1961, he figures. By 1965, the monthly rate will top 600 million, the official predicts.

2. Unfair competition is the "practice of endeavoring to substitute one's own goods or products in the markets for those of another . . . by means of imitating . . . , the imitation being carried far enough to mislead the general public . . . ." BLACK'S LAW DICTIONARY 1699 (4th ed. 1951).

3. U. S. CONST. art. I, § 8 gives Congress the power "[t]o promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . ."

4. Copyright Law, 17 U.S.C. §§ 1-216 (1964).

5. Copyright Law, 17 U.S.C. § 1 (1964).

6. The pertinent provisions dealing with the securing of copyright include 17 U.S.C. §§ 3, 4, 5, 9, 10, 16, 19 & 20 (1964).

copying in some cases under the doctrine of fair use;<sup>7</sup> thus, the measure of protection has been diluted.

The time was when a reader made a pen or pencil copy of but a few passages of copyrighted material for his own purposes. Such private copying was customary and beyond the pale of copyright challenge.<sup>8</sup> Hand copying was automatically self-policing: the nature of hand copying rendered its own quantitative limit on the number of copies which could be made. The copyright owner could not feasibly control private copying<sup>9</sup> and use, but more importantly, his livelihood was not in jeopardy.<sup>10</sup> Reproduction for private use, however, takes on different dimensions when made by modern copying devices<sup>11</sup> capable of reproducing quickly any volume of material in any number of copies. This is especially true when the copies are made to be given to other persons, say students.<sup>12</sup> Here, there is direct competition with the sale of the work, the copy being a substitute for the original and leading to a diminished market for the publisher. In this case a private use is changed to a public use.<sup>13</sup>

7. Although the Code speaks of the "exclusive rights" of the copyright holder, as a matter of general experience it is known that some copying of copyrighted works is permitted. Book reviewers quote from copyrighted works in their criticism; authors create burlesques or parodies of copyrighted material; and newspapers frequently contain synopses of copyrighted matter. These three uses seem to be infringements of the "exclusive" rights granted to the copyright owner under section 1 of the Copyright Act; yet the courts have found no infringement here. Courts have said that such uses were fair uses and not infringing uses. AMDUR, COPYRIGHT LAW AND PRACTICE 757-66 (1936).

8. KAPLAN & BROWN, COPYRIGHT 314 (1960). See also Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMPOSIUM 43, 58 (1955).

9. U. S. HOUSE COMM. ON THE JUDICIARY, 87th CONG., 1st SESS., REPORT OF THE REGISTER OF COPYRIGHTS, GENERAL REVISION OF THE U. S. COPYRIGHT LAW 25 (Comm. Print 1961).

10. Since actual damages or profits would be almost incapable of proof, a court would be compelled to assess the minimum of \$250 if it found a technical infringement. "There's been a tendency, in some cases for the courts to find no infringement in order to avoid the minimum of \$250." *Id.* at 178, See *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939); cf. *Gross v. Van Dyk Grovure Co.*, 230 F. 412, 413 (2d Cir. 1916).

11. Needham states that "'do it yourself' home copyright infringement kits are available to everyone." Needham, *Tape Recording, Photocopying, and Fair Use*, 10 COPYRIGHT LAW SYMPOSIUM 75 (1959). A form of copying more subtle, more sophisticated than present direct reprography techniques is that done to form the massive information systems of computers. See *Newsweek*, Oct. 21, 1963, at 92; Freed, *Prepare Now for Machine-Assisted Legal Research*, 47 A.B.A.J. 764 (1961); N.Y. Times, Feb. 26, 1962, at 17, col. 6.

12. *MacMillan Co. v. King*, 223 F. 862, 863 (D. Mass. 1914).

13. Hand copying for private use, although a violation of the literal translation of the statute, is allowable as a fair use. But the rationale breaks down even when the reproduction is for very limited distribution for teaching purposes. *Id.* at 866-67.

The making of a single copy for a public or commercial purpose such as resale might well be an infringement,<sup>14</sup> unless the copy is of de minimus proportions.<sup>15</sup> Multiple copy pirating for public use, whether commercial or not, is more clearly an infringement because of the competition-substitution aspect of such copying and the notion that any public proliferation or publication infringes the exclusive right of the copyright owner.<sup>16</sup> The user takes a free ride instead of paying his own way as he should.

The distinction, I would suggest, is simply private use vis-a-vis public use. This is not a sticky or vague concept like reasonable or commercial use.<sup>17</sup> Should the public appropriation accord with the traditional notions of fair use, the use, though copyright infringement, is privileged and justified. But we are still faced with a dilemma: How can copyright holders stop substantially all the infringing unfair reproduction now spreading apace because of the new technology? How can

14. "Mere printing or copying . . . without proof of sales thereof, will constitute an infringement." *Greenbie v. Noble*, 151 F. Supp. 45, 63 (S.D.N.Y. 1957).

15. Publishers, rather than spending money on law suits, have attempted to solve the problem through private agreements. See Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIBRARY J. 197, 202-04 (1953). In the case of *MacMillan Co. v. King*, 223 F. 862 (D. Mass. 1914), the court enjoined the defendant from the further use of plaintiff's book, stating that "proof of actual damage is not necessary for the issuance of an injunction, if infringement appears and damage may probably follow from its continuance." *Id.* at 868. Publishers could take a cue from this case, when bringing suit in a penumbral case, to sue for injunction alone under 17 U.S.C. § 112 (1964) and not force the court to choose between minimum damages of \$250 under section 101(b) and no infringement at all. Lest one begin to think that old rulings like *Novello v. Sudlow*, 138 Eng. Rep. 869 (1852) would be overturned today in view of such public policy reasons as promoting the velocity of ideas, the case of *Wihitol v. Crow*, 309 F.2d 777 (8th Cir. 1962) should be examined.

16. Assuming some copying of a copyrighted work, the crucial question is whether or not defendant's work is or may be used as a substitute for plaintiff's work. In case after case the court has sought to find if there has been this unfair competition by the user, called wrongful appropriation. See *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294 (7th Cir. 1902); *Produce Reporter Co. v. Fruit Produce Rating Agency*, 1 F.2d 58 (E.D. Ill. 1924); *Ginn & Co., v. Apollo Pub. Co.*, 215 F. 772 (E.D. Pa. 1914); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (C.C.D. Mass. 1841). Since the broad rationale of *INS v. AP*, 248 U.S. 215 (1918) appears in copyright cases whenever the issue of substitution or commercialism exists, it is reasonable to say that the concept of fair use is the same in copyright law and unfair competition. See generally Leach & Feldman, *The Relationship Between Copyright & Unfair Competition Principles*, 10 COPYRIGHT L. SYMPOSIUM 266 (1959).

17. See Petre, *Statutory Copyright Protection for Books and Magazines Against Copying Machines*, 39 NOTRE DAME L. REV. 161 (1964).

users be supplied with the copies they need to promote progress without undercutting the publishers' market?

Since to relieve the symptoms is not to cure the disease, I would propose a broad battery of measures to attack the copying cancer. My underlying theory is to leave the doctrine of fair use in pristine form and to provide a statutory licensing framework with the maximum of private ordering under a clearing house arrangement.

## II. LIMITATION OF THE RIGHT TO EXCLUSIVITY: THE DOCTRINE OF FAIR USE

Essentially, a copyright,<sup>18</sup> when secured by compliance with the copyright act,<sup>19</sup> gives to the proprietor the right to print or otherwise reproduce, publish, distribute, sell or transfer

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18. Here we come to the crux of the technological revolution in copying. It is now possible—in fact, it is widespread practice—to use a copyright holder's work without his being able to claim a sale of it.

19. 17 U.S.C. §§ 1-216 (1964).

A dual system of copyright protection exists in the United States; common law protection and federal statutory protection. This paper will deal exclusively with the statutory copyright except for the brief discussion of the common law in this note.

The Copyright Act, 17 U.S.C. § 2 (1964) preserves and leaves undisturbed the common law rights of an author or proprietor in his unpublished work. The common law rights of an author exist in his unpublished manuscript. These rights include ownership of the physical manuscript, the right to its first publication, the right to prevent the unauthorized publication of the manuscript, and the right to secure a statutory copyright. See *AMBUR, COPYRIGHT LAW AND PRACTICE* 5 (1936). Once an idea is in manuscript form, it is automatically protected by common law. See *id.* The author may submit it to a publisher, read it to a friend, or do anything short of general publication, *Bobbs-Merrill Co. v. Straus* 147 F. 15, 18 (2d Cir. 1906), *aff'd*, 210 U.S. 339 (1907), and the manuscript remains the exclusive property of the author. A general publication or dissemination to the public, "as implies an abandonment of the right of copyright or its dedication to the public," *Werckmeister v. American Lithographic Co.*, 134 F. 321, 326 (2d Cir. 1904), terminates the common law copyright. The work then has fallen into the public domain and becomes public property if the author allows this general publication—say offering copies for sale or distributing them to the public—without complying with the copyright act.

Compliance with the act will insure continuous copyright protection since this statutory coverage begins where common law copyright protection ends. The common law right is a prepublication right. Upon general publication, either the work is protected by statute, if the requirements of the statute are met, or the work passes to the public where it can never be retrieved. *American Code Co. v. Bensinger*, 282 F. 829 (2d Cir. 1922). Statutory copyright, therefore, is a copyright after general publication.

The Copyright Act, 17 U.S.C. § 12 (1964) accords statutory protection to certain enumerated *unpublished* works; with this exception, the statute does not reach unpublished works. It follows that the doctrine of fair use is limited to copyrighted works, and is inapplicable in an action to enjoin an unauthorized use. *Golding v. RKO Pictures, Inc.*, 35 Cal. 2d 690, 221 P.2d 95 (1950).

ownership in an original work of literature to the exclusion of others.<sup>20</sup> It is a monopoly, as Judge Learned Hand opined, "to prevent others from *reproducing* the copyrighted work."<sup>21</sup> However, unlike a patent monopoly which grants to the patentee the right to the absolute *use* of the patented article,<sup>22</sup> the copyright "monopoly" is subject to any "fair use" the public may make of the copyrighted work.<sup>23</sup> While ownership rights are to be protected, "the primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors."<sup>24</sup> This has been the policy followed by Congress<sup>25</sup> and the courts both in patent<sup>26</sup> and copyright<sup>27</sup> litigation.

All actions for copyright infringement are based on section 1 of the act.<sup>28</sup> But since infringement is not defined in the statute, a judicial wrestling match<sup>29</sup> must decide the degree of exclusivity of the copyright holder's "exclusive rights."<sup>30</sup> The

20. See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907); *Carter v. Bailey*, 64 Me. 458 (1874). Copyright Law, 17 U.S.C. § 1 (1964) gives the proprietor "the exclusive right (a) to print, reprint, publish, copy, and vend the copyrighted work." Many other rights are implicitly recognized in sections 1(b) through (3). The most recent copyright law revision bill, H. R. 2512, 90th Cong., 1st Sess. (1967), while recognizing this general feature of copyright has spelled out other rights, including the following: preparation of derivatives, § 106(2); performance in public, § 106(4); and display in public, § 106(5).

21. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 88 (2d Cir. 1940) (emphasis added), *cert. denied*, 311 U.S. 712 (1940).

22. See, e.g., *Avery v. Wilson*, 20 F. 856 (W.D.N.C. 1884); *Crown Cork & Seal Co. v. State*, 87 Md. 687, 40 A. 1074 (1898); *Commonwealth v. Central Dist. & Printing Tel. Co.*, 145 Pa. 121, 22 A. 841 (1891). See also 35 U.S.C. § 154, which grants to patent owners "the right to exclude others from using . . . the invention."

23. See, e.g., *Loew's, Inc. v. CBS, Inc.*, 131 F. Supp. 165, 174 (S.D. Cal. 1955), *aff'd sub. nom.*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd memo. by an equally divided Court sub nom.* *CBS v. Loew's, Inc.* 356 U.S. 43 (1958); *Eichel v. Marcin*, 241 F. 404, 410-11 (S.D.N.Y. 1913).

24. *Fox Film Corp. v. Doyal* 286 U.S. 123, 127 (1932) (Mr. Chief Justice Hughes).

25. See H. R. REP. No. 2222, 60th Cong., 2d Sess. 2924, 3701-05, 3761, 3765-68 (1909).

26. See, e.g., *Woodbridge v. United States*, 263 U.S. 50 (1923); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *Torok v. Watson*, 122 F. Supp. 788 (D.D.C. 1954).

27. See, e.g., *Mazer v. Stein*, 347 U.S. 201 (1954); *Becker v. Loew's, Inc.* 133 F.2d 889 (7th Cir. 1943), *cert. denied*, 319 U.S. 772 (1944); *Martinetti v. Maguire*, 16 F. Cas. 920 (No. 9,173) (C.C. Cal. 1867).

28. 17 U.S.C. § 1 (1964).

29. A classic unsporting event is *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

30. Copyright Law, 17 U.S.C. § 1 (1964).

protection afforded by a copyright contemplates and permits fair use of the copyrighted property.<sup>31</sup> Courts have typically resolved this problem by requiring substantial copying of the physical expression of the copyrighted work as the essential element of the cause of action.<sup>32</sup>

A copyright owner who contends that his rights have been infringed must show both the defendant's access to the material and the identity of the copyrighted original with the alleged infringing copy.<sup>33</sup> Intent to infringe need not be proved,<sup>34</sup> and the test of similarity is not what the defendant intended to represent, but whether the copying would be discernible by the general public.<sup>35</sup> Assuming that substantial appropriation has been found, what appears on its face to be a clear case of infringement may be defeated if the appropriation comes within the doctrine of fair use.<sup>36</sup>

"Fair use" is not defined, nor even mentioned, in the Copyright Act,<sup>37</sup> but the doctrine was recognized in England before our laws were passed.<sup>38</sup> The term apparently originated in

31. *Eichel v. Marcin*, 241 F. 404 (S.D.N.Y. 1913); see 18 C.J.S. *Copyright and Literary Property* § 92 (1939).

32. *E.g.*, *Perris v. Hexamer*, 99 U.S. 674 (1878); *Carr v. Nat'l Capital Press*, 71 F.2d 220 (D.C. Cir. 1934); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926).

33. *Carew v. RKO Radio Pictures, Inc.*, 43 F. Supp. 199 (S.D. Cal. 1942); *Seltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938).

34. *Chappell & Co. v. Costa*, 45 F. Supp. 554 (S.D.N.Y. 1942).

35. *Lewis v. Kroger Co.*, 109 F. Supp. 484 (S.D.W. Va. 1952); *Barbodillo v. Goldwyn*, 42 F.2d 881 (S.D. Cal. 1930); *Roe-Lawton v. Hal E. Roach Studios*, 18 F.2d 126 (S.D. Cal. 1927).

36. *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

37. *Compare Story v. Holcombe*, 23 F. Cas. 171, 175 (No. 13,497) (C.C.D. Ohio 1847) (purported abridgement of Story's COMMENTARIES ON EQUITY JURISPRUDENCE) with *G. Ricordi & Co. v. Mason*, 201 F. 182 (C.C.S. D.N.Y. 1911) (preliminary injunction denied), 201 F. 184 (S.D.N.Y. 1912) (injunction denied), *aff'd per curiam*, 210 F. 277 (2d Cir. 1913) and *Lawrence v. Dana*, 15 F. Cas. 26 (No. 8,136) (C.C.D. Mass. 1869) (controversy between two editors of Henry Wheaton's ELEMENTS OF INTERNATIONAL LAW). But section 107 of the Copyright Law Revision Bill of 1967 would expressly recognize the principle of fair use as a limitation on the exclusive rights of the copyright proprietor under the provisions of section 106. H. R. 2512, 90th Cong., 1st Sess. (1967).

38. In England the doctrine is now statutory and the phrase is "fair dealing." The Copyright Act of 1911, 1 & 2 Geo. 5, ch. 46, § 2(1)(i), at 183 specifies that a copyright is not infringed by "any fair dealing with any work for purposes of private study, research, criticism, review or newspaper summary." See *Dodsley v. Kinnorsley*, 27 Eng. Rep. 270 (Ch. 1761); *Gyles v. Wilcox*, 26 Eng. Rep. 489 (Ch. 1740). See also *Story v. Holcombe*, 23 F. Cas. 171, 173 (No. 13,497) (C.C.D. Ohio 1847); *Tonson v. Walker*, 36 Eng. Rep. 1017, 1020 (Ch. 1752).

1810 when, in the case of *Wilkins v. Aikin*,<sup>39</sup> Lord Eldon contrasted what he called "fair quotation"<sup>40</sup> with the taking of the "whole or part"<sup>41</sup>—meaning a substantial or material part—of another's work. In isolating this concept that only the taking of a substantial part is infringement, the English judges, through a process of semantic evolution, came to refer to an appropriation not substantial enough to infringe as "fair use."<sup>42</sup> In 1878, Lord Hatherley in *Chatterton v. Cave*<sup>43</sup> said that "if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, a 'fair use' only be made of the publication, no wrong is done and no action can be brought . . ."<sup>44</sup> Our courts, with similar language, adopted the expression from the beginning.<sup>45</sup> Definitions<sup>46</sup> which have been given by the authorities unhappily are at sixes and sevens and provide little help in understanding the cases or drawing the line between an infringing use and a "fair use"<sup>47</sup> in any particular case. Despite this definitional controversy, it should prove useful to set forth one of the leading statements<sup>48</sup> of the

39. 34 Eng. Rep. 163 (1810).

40. *Id.* at 164.

41. *Id.*

42. See, e.g., *Scott v. Stanford*, L.R. 3 Eq. 718 (1867); *Jarrold v. Houlston*, 69 Eng. Rep. 1294, 1297 (1857); *Lewis v. Fullarton*, 48 Eng. Rep. 1080 (1839).

43. 3 App. Cas. 483 (1878).

44. *Id.* at 492.

45. *Baker v. Selden*, 101 U.S. 99 (1879); *Simms v. Stanton*, 75 F. 6 (N.D. Cal. 1896); *Folsom v. Marsh*, 2 F. Cas. 342, 343-44 (No. 4,901) (C.C.D. Mass. 1841); see AMDUR, COPYRIGHT LAW AND PRACTICE 754-82 (1936); HOWELL, THE COPYRIGHT LAW 125-217 (1952); 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY PROPERTY 805-06 (1938); LINDLEY, PLAGIARISM AND ORIGINALITY 1011 (1952); SPRING, RISKS AND RIGHTS 176-88 (1952); 15 So. CAL. L. REV. 249 (1942).

46. Scott, in his treatise on trusts, writes:

Even if it were possible to frame, an exact definition of a legal concept, the definition would not be of great practical value. . . . All that one can properly attempt to do is to give such a description of a legal concept that others will know in a general way what one is talking about.

1 SCOTT, TRUSTS § 2.3 (3d ed. 1967).

47. The difficulty of line drawing has prompted the prestigious Court of Appeals for the Second Circuit to conclude that "the issue of fair use . . . is the most troublesome in the whole law of copyright . . ." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

48. Weil, fifty years ago, defined fair use as simply a use which is legally permissive, either because of the scope of a copyright, the nature of the work, or by reason of the application of known commercial, social or professional usages, having the effect of custom, insofar as these do not expressly run contrary to the plain language of copyright legislation.

WEIL, AMERICAN COPYRIGHT LAW 429 (1917). In another formulation, fair use is thought to be "technically forbidden by the law, but allowed as reason-



doctrine of fair use, which has been adopted for purposes of this paper:

Fair use may be defined as a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright.<sup>49</sup>

"Fair use," then, is the privileged use of copyrighted material without express license.<sup>50</sup>

In the leading American case of *Folsom v. Marsh*,<sup>51</sup> Mr. Justice Joseph Story acknowledged that copyright "justifiable use" issues "approach, nearer than any other class of cases belonging to forensic discussions, . . . the metaphysics of the law, where the distinctions are . . . very subtle and refined, and, sometimes, almost evanescent."<sup>52</sup>

It is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions; whereas, in other cases, the identity of the two works in substance, and the question of piracy often depend upon a nice balance of the comparative use made in one of the materials of the

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able and customary, on the theory that the author must have foreseen it and tacitly consented to it." DEWOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925). According to Cohen, the courts "generally give a functional definition of fair use, speaking of it as the right to quote for purposes of criticism and comment, or as the right of a writer to use an earlier work in preparing his own." Cohen, *Fair Use in the Law of Copyright*, in 6 COPYRIGHT L. SYMPOSIUM 43, 58 (1955). In the case of *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121, (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), Judge Hand advanced the proposition that fair use is only a way of describing insubstantial copying. Furthermore, he stated: "Then the question is whether the part so taken is 'substantial', and therefore not a 'fair use' of the copyrighted work; it is the same question as arises in the case of any other copyrighted work." Cf. *MacDonald v. DuMaurier*, 144 F.2d 696 (2d Cir. 1944); Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 BULL. COPYRIGHT SOC. 53, 60-62 (1958). In a later case Judge Hand spoke of fair use "as copying the theme or ideas rather than their expression." *Sheldon v. Metro-Goldwyn Pictures Corp.* 81 F.2d 49, 55 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936). Seemingly, the great judge was mistaken in confusing "theme" or "ideas" with "expression." Since the former are not copyrightable, their use is not a use of protected works. *Holmes v. Hurst*, 174 U.S. 82 (1899).

49. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

50. That there is some disagreement as to whether fair use is a privileged infringement of copyright or whether fair use simply does not infringe the copyright; however, the divergence in view seems to have no practical significance.

51. 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

52. *Id.* at 344.

other, the nature, extent, and value of the materials thus used; the objects of each work; and the degrees to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.<sup>53</sup>

The uncertainties involved in questions of fair use have led to the general principle that the determination of "fair use" in a given case is a pragmatic question to be considered in light of all the facts of each case.<sup>54</sup>

#### *A. Rationale for the Doctrine of Fair Use.*

Before attempting to determine whether a particular use of literary materials will be a fair use, it is necessary to examine the rationale and primary considerations behind the doctrine of fair use. More importantly, it should be determined to what extent such a theoretical basis has been taken into account in particular applications of the doctrine of fair use.

The common law right of an author to the exclusive ownership of his literary work was acknowledged in England in 1662.<sup>55</sup> By 1700, literary piracy in England was becoming a national outrage.<sup>56</sup> Swift, Addison, and Steele, as well as several publishers who were alarmed by the trend, petitioned Parliament for an act to protect their exclusive ownership rights.<sup>57</sup> This resulted in the passage of an act granting authors protection for fourteen years against the infringement of their published materials.<sup>58</sup>

Statutory protection of copyrights in the United States is based on the English statute of 1709.<sup>59</sup> Before the adoption of the Constitution in 1787 twelve of the original thirteen

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53. *Id.*

54. *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); see *DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 386 (1879).

55. *COPINGER & JAMES, LAW OF COPYRIGHT* 7 (8th ed. 1948).

56. Until the invention of the printing press and moveable type, around 1456, which made publishing a mass production industry, there was no need for a set of legal rules.

57. See *WINCOR, HOW TO SECURE COPYRIGHT* 16 (1950).

58. 8 Anne, ch. 19, § 1 (1709); see *SIEBERT, FREEDOM OF THE PRESS IN ENGLAND: 1476 to 1776*, at 74 (1952).

59. Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203 (1954).

colonies had enacted copyright statutes.<sup>60</sup> Despite the near universal opinion that the distinguished lexicographer Noah Webster fathered the modern law of copyright, a careful reading of dusty tomes indicates that the honor of paternity belongs instead to Andrew Law and John Ledyard.<sup>61</sup>

Connecticut passed the first copyright statute in 1783. Within several months of the passage of this statute, the Continental Congress appointed a committee "to consider the most proper means of cherishing genius and useful arts throughout the United States by securing to the authors or publishers of new books their property in such works."<sup>62</sup> That committee recommended, and the Continental Congress adopted, a resolution requesting all of the states to enact laws securing to authors property rights in their works. All of the states but Delaware responded by adopting copyright statutes similar to Connecticut's.<sup>63</sup>

James Madison, together with Charles Pinckney, presented to the Constitutional Convention the proposal for a power in Congress "to secure to literary authors their copyright for a limited time, to encourage by premiums and provisions, the

60. New York was the thirteenth and last of the original states to fall in line, passing its law in April 1786. See Pforzheimer, *Historical Perspective on Copyright Law and Fair Use in REPROGRAPHY AND COPYRIGHT LAW* 18, 27 (Hattery & Bush ed. 1964).

61. In 1782, Webster was just completing his popular speller, *THE GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE*. His desire to assure protection for that famous work led him to seek protection for it in the legislatures of the several states. The Webster myth which followed was the result of an error by the House Committee on Patents in 1909, when it stated in its report that "the first copyright statute ever passed in this country was passed by the legislature of Connecticut in 1785 at the solicitation of Noah Webster, who desired copyright protection for his spelling book." H. R. REP. NO. 2222, 60th Cong., 2d Sess. 2 (1909). In 1781 one Andrew Law petitioned the Connecticut Assembly, begging for the sole right of "imprinting and vending" his book, *COLLECTION OF THE BEST TUNES [FOR THE PROMOTION OF PSALMODY] OF NEW HAVEN*. The Connecticut Legislature granted his plea. In January 1783 John Ledyard, an explorer with the famous Captain James Cook sought protection for the exclusive publication rights of his *JOURNAL OF CAPTAIN COOK'S LAST VOYAGE TO THE PACIFIC OCEAN*. In granting this protection the Connecticut Legislature recommended that:

as it appears that several Gentlemen of Genius & reputation are also about to make similar Applications for the exclusive right [to] publish Works of their Respective Compositions, your Committee are of the opinion that it is expedient to pass a general bill, for that purpose and thereupon report the Annexed Bill.

LEHMAN-HAUPT with GRANNIS & WRATH, *THE BOOK IN AMERICA* 90 (1939).  
62. 24 JOURNALS OF THE CONTINENTAL CONGRESS 180 (G.P.O.).

63. See generally BOWATER, *COPYRIGHT, ITS HISTORY AND LAW* 8-28 (1912); COPINGER & JAMES, *THE LAW OF COPYRIGHT* 1-21 (8th ed. 1948); LEHMAN-HAUPT with GRANNIS & WRATH, *THE BOOK IN AMERICA* (1939); PUTNAM, *THE QUESTION OF COPYRIGHT* 355-64 (3d ed. 1904); Solverg, *Copyright Law Reform*, 35 YALE L.J. 48 (1925).

advancement of useful knowledge and discoveries.”<sup>64</sup> The result was Article I, section 8, clause 8 of the Constitution. This was the source of Congressional power for the Act of 1790 and all later copyright legislation. It ended the need for state copyright legislation.<sup>65</sup> The third revision of the copyright laws in 1909, repealing the laws of 1831 and 1870, provided for an original copyright of 28 years with a period of renewal of 28 years,<sup>66</sup> and, except for minor amendments, provided the basis for copyright law as it is today. A much-needed revision is assured for the not too distant future.<sup>67</sup>

The primary purpose for copyright protection is the public good. Hence, the most useful justification for fair use is phrased in terms of the constitutional scheme of which it is a part. In the words of the Constitution, copyright legislation shall “promote the Progress of Science and useful Arts.”<sup>68</sup> Any judicial limitation placed on this constitutional grant, such as the fair use doctrine,<sup>69</sup> must have a basis in some important underlying policy. Lord Mansfield in 1785 stated such a policy:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the

64. 5 DEBATES OF THE FEDERAL CONSTITUTION 439-40 (Eliot ed. 1907); WARREN, THE MAKING OF THE CONSTITUTION 625, n. 1 (1928).

65. Congress has plenary authority in such matters. *Wollen v. Banker*, 30 F. Cas. 603 (No. 18,030) (C.C.S.D. Ohio 1877).

66. Copyright Law, 17 U.S.C. § 24 (1964).

67. See H.R. 2512, 90th Cong., 1st Sess. (1967) (Copyright Law Revision Bill).

68. U.S. CONST. art. I, § 8. See also H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909).

69. Latman seems to offer a theory of “consent” enforced by the figurative bargain embodied in the securing of a statutory copyright, Latman, *Fair Use of Copyrighted Works, Study No. 14* in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE COMMITTEE ON THE JUDICIARY, 86th Cong., 1st Sess. 7 (1958), in place of the unsatisfactory implied consent doctrine. His explanation goes like this:

[A]s a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyrighted work to promote the ends of public welfare for which he was granted copyright. The theory of “enforced consent” . . . relies more directly upon the constitutional purpose of copyright . . . . A certain degree of latitude for users of copyrighted works is indispensable for the “Progress of Science and useful Arts.”

arts be retarded. The act that secures copyright to authors guards against the piracy of words and sentiments; but it does not prohibit writing on the same subject.<sup>70</sup>

The use of copyrighted material, then, is permitted when the public will benefit from the author's work, without that use seriously discouraging progress of the art or greatly injuring the artist. It is a balancing of social value against detriment to the artist.

It is for the public benefit that reasonable copying of copyright works is allowed. This basic public policy is also behind the courts' denial of proprietorship rights in ideas. Ideas are the common property of mankind and may be copied.<sup>71</sup> An author acquires only the right to the manner he takes to express his ideas, and even his mode of expression may be reasonably copied under the doctrine of fair use.

This policy involves the reconciliation of what seem to be two conflicting interests: the right of the author to retain complete control over his works and the right of the general public to gain the benefit of the work. In theory, however, these two desires can be said to merge since the reward granted the author will induce him to make public the fruits of his intellectual harvest.<sup>72</sup> Even for writers for whom the commercial incentive is not necessary because they create simply for the ecstasy of creation, Mr. Justice Wille's dictum is apropos:

It is wise in any state, to encourage letters and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works. . . .

A writer's fame will not be the less, that he has bread, without being under the necessity of prostituting his pen to flattery . . . .

70. Sayre v. Moore, 102 Eng. Rep. 139, 140 (1785).

71. Baker v. Selden, 101 U.S. 99, 103 (1879). "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains." The forms in a form book may be copied, for example. Cases in this area are often decided on the theory that the presumed intention of the author is to allow certain uses of the work. "When the plaintiff put on the general market a book of forms, he implied the right to their private use. This conclusion follows from the nature of a book of forms. No one reads them as literature; their sole use is in their usability." American Institute of Architects v. Fenichel, 41 F. Supp. 146, 147 (S.D.N.Y. 1941).

72. See U. S. v. Paramount Pictures, 334 U.S. 131, 158 (1947).

He who engages in a laborious task . . . will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family.<sup>73</sup>

Nevertheless, to the extent that the two interests are inconsistent in practice,<sup>74</sup> priority must be given to the public because "the copyright law, like the patent statutes, makes reward to the owner a secondary consideration."<sup>75</sup> Encouragement of literary and other intellectual labors for the public interest will be furthered by allowing subsequent fair use of a copyrighted work without the consent of the copyright holders.<sup>76</sup> Every determination of fair use must ultimately rest on this rationale.

There is more to copyright, however, than the purpose of disseminating learning. There is also the method by which that purpose is to be achieved. This is what the Supreme Court has called the "economic philosophy behind the clause—the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . ."<sup>77</sup> The concept of copyright is itself a practical method of reconciling the two competing desires for free availability of learning and encouragement of individual effort by opportunity for personal gain.

Another explanation postulates that fair use arises out of the "implied consent" of the author to a reasonable use of his works.<sup>78</sup> While one may meaningfully speak of the implied

73. *Millar v. Taylor*, 98 Eng. Rep. 201, 218 (1769).

74. *See Continental Cas. Co. v. Beardsley*, 151 F. Supp. 28 (S.D.N.Y. 1957), modified, 253 F.2d 702 (2d Cir. 1958), cert. denied, 358 U.S. 816 (1958). Judge Hinck's decision, 253 F.2d 702 (2d Cir. 1958), is well worth reading. *See also* 47 CALIF. L. REV. 174 (1959).

75. *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1947). In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 131 (1932), the Court pointed out that a copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius, meditations, and skills of individuals and for the incentive to further efforts for the same important objectives. *See also* *Becker v. Loew's, Inc.*, 133 F.2d 889 (7th Cir. 1943), cert. denied, 319 U.S. 772 (1944).

76. *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957). "The right of subsequent authors, publishers and the general public to use the works of others to a limited extent has always been universally recognized as consistent with the object of publication and the policy of encouraging the dissemination of knowledge, learning and culture . . . ." BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 259 (1944).

77. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

78. *See, e.g.,* *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905); *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941); *Karl v. Curtis Publishing Co.*, 39 F. Supp. 836 (E.D. Wis. 1941); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938). *See also* 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 805 (1938).

consent of the author to having his book read, sold, or criticized by a purchaser,<sup>79</sup> and a few other uses,<sup>80</sup> in most cases this implication of consent appears fictitious and unsuited for a rational system of jurisprudence. If fair use is premised "on the theory that the author must have foreseen it and tacitly consented to it,"<sup>81</sup> an author should be able to withdraw these rights by appropriate notice contained in the work.<sup>82</sup> The results of a comprehensive study of literary materials published within the last ten years, supported by interviews with interested parties, shows that it is simply standard operating procedure to carry a reservation of all rights in the name of the copyright owner.<sup>83</sup> Pragmatically, these findings alone would undermine the implied consent theory. Copyright, however, is not a consensual undertaking, and the intent of the parties is not an essential factor.<sup>84</sup>

Where the use is only "incidental"<sup>85</sup> or where the work is not of a scholarly nature,<sup>86</sup> the maxim *de minimus non curat lex* provides a basis for fair use. This underlying rationale

79. *See Universal Film Mfg. Co. v. Cooperman*, 218 F. 577 (2d Cir. 1914).

80. *See, e.g., Baker v. Selden*, 101 U.S. 99, 103 (1880) (use of a bookkeeping system); *American Institute of Architects v. Fenichel*, 41 F. Supp. 146, 147 (S.D.N.Y. 1941) (use of forms from architectural contract form book); *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941) (use of a song dedicated to a professional football team in an article about the team); *G. Recordi & Co. v. Mason*, 201 F. 182 (C.C.S.D.N.Y. 1911) (preliminary injunction denied), 201 F. 184 (S.D.N.Y. 1912) (injunction denied).

81. DEWOLFE, *AN OUTLINE OF COPYRIGHT LAW* 143 (1925). It is suggested that this is nothing more than constitutional doctrine in contract clothing.

82. The following legend is illustrative of restrictive intent:

Copyright 1963, by Yale University. All rights reserved. This book may not be reproduced, in whole or in part, in any form (except by reviewers for the public press), without written permission from the publishers.

An interesting express indication of the authors' intentions is seen set forth below:

Copyright 1964, by George P. Bush. George P. Bush will not enforce his copyright after January 1, 1970. Permission to copy the whole or part of this document is hereby granted to those who wish to use such copies in educational works, professional journals, as well as in an information handling storage or retrieval system. Permission to others to copy is governed by "Fair Use."

83. Detailed analysis of the conclusions of this research, undertaken coincident with this paper, are available upon request to the author.

84. *See Cohen, Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMPOSIUM 43, 61 (1955): "Implied consent" is really no more than convenient fiction . . . ."

85. *Shapiro, Bernstein & Co. v. P. F. Collier & Co.*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934).

86. *See, e.g., Bloom v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903); *cf. Johnstone v. Bernard Jones Publications, Ltd.*, [1938] 1 Ch. 599.

early became embodied in the precedent<sup>87</sup> of equity courts where many fair use cases arose. Since the court did not want to encourage such nuisance suits where the amount taken was not very large, the Chancellor could refuse to issue an injunction if there was no clear showing of substantial injury to the plaintiff.<sup>88</sup> Today this reluctance is an anachronism<sup>89</sup> under modern practice where the same court can award damages at law as well as an injunction and other equitable remedies. Although the Copyright Act provides that "*all the copyrightable component parts of the work copyrighted*"<sup>90</sup> shall be protected, the courts have engrafted upon the law the doctrine that infringement may be said to mean substantial appropriation of copyrighted material.<sup>91</sup> Where an action for infringement was brought, it was the rule that substantial appropriation must be shown to obtain relief.<sup>92</sup> Since the doctrine of substantial appropriation is applied in infringement actions it should not enter into the question of fair use. By the same token if the taking is not sufficient enough to be substantial, the issue of fair use would not arise.<sup>93</sup>

Custom<sup>94</sup> or customary usage<sup>95</sup> has also been suggested as a basis for the doctrine. At the one extreme, a plaintiff copyright owner should not be forestalled from relief solely because prior potential plaintiffs have not chosen to exercise their rights. But at the other extreme, writers (potential defendants)

87. Early fair use cases brought in equity include *Lawrence v. Dana*, 15 F. Cas. 26 (No. 8,136) (C.C.D. Mass. 1869); *Lewis v. Fullarton*, 48 Eng. Rep. 1080 (Rolls Ct. 1839); *Mawman v. Tegg*, 38 Eng. Rep. 380 (Ch. 1826).

88. Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMPOSIUM 43, 50 (1955).

89. Copyright Law, 17 U.S.C. § 101 (1964) provides that actions for injunction, damages and profits may be combined.

90. *Id.* § 1 (1964) (emphasis added).

91. See, e.g., *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939); *aff'd* 309 U.S. 390 (1940); *Ansehl v. Puritan Pharmacy Co.*, 61 F.2d 131 (8th Cir. 1932), *cert. denied*, 287 U.S. 666 (1932); *Chatterston v. Cave*, 3 App. Cas. 483 (1878); *Bohn v. Bogue*, 7 L.T. (o.s.) 277 (1846).

92. See, e.g., *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83, 84 (7th Cir. 1906), *aff'd*, 209 U.S. 20 (1908); See *Nimmer, Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1127 (1951).

93. See note 50 & accompanying text *supra*.

94. See 15 So. CAL. L. REV. 249, 250 (1942).

95. See *Dodsley v. Kinnorsley*, 27 Eng. Rep. 270 (Ch. 1761); BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944); DEWOLFE, AN OUTLINE OF COPYRIGHT LAW 143 (1925); WEIL, AMERICAN COPYRIGHT LAW 429-30 (1917). But see *Walter v. Steinkopff* [1892] 3 Ch. 489, which held that custom could not control the law.



should be able to feel secure from legal liability when following long established reasonable practices of their art. Although the potential plaintiff may be deterred from litigation, the existence of a custom does not explain the existence of the doctrine of fair use.<sup>96</sup> One court has stated that fair use is such use as is "reasonable and customary,"<sup>97</sup> but it does not follow that a use must be customary to be a privileged fair use. It is crystal clear that novel use which is a departure from custom may be embraced within the doctrine if it meets the established judicial criteria.

In summary, it seems that these theories are subordinated to, and are a part of, the rationale that "fair use is all use dedicated to the public by the nature of statutory copyright."<sup>98</sup> The virtue of these other theories lies in helping courts, in appropriate fact situations, to implement this policy.

#### *B. Types of Use Recognized.*

Certain types of appropriations have traditionally come under the shelter of the fair use defense. A review of the more characteristic situations will reveal the various criteria of fair use, how they interact, and how the cases overlap.

*Scholarly Works.* Scholarly works concerned with literature, science and the arts generally may be appropriated if the original form is not taken.<sup>99</sup> The foundation for this general rule is that the object of a scholarly work is to give to the world the knowledge it contains. If this cannot be accomplished without liability, the policy is frustrated, and "the progress of science and the useful arts" is greatly impeded.<sup>100</sup> For example, when the substance of a work cannot be conveyed without the methods and diagrams contained therein, they are considered as necessary incidents and given to the public. The privilege

96. Cohen, *Fair use in the Law of Copyright*, 6 COPYRIGHT L. SYMPOSIUM 43, 51 (1955).

97. *Shapiro, Bernstein & Co. v. P. F. Collier & Co.*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934).

98. SHAW, *LITERARY PROPERTY IN THE UNITED STATES* 67 (1950). Shaw finds that the inherent nature of the copyright laws require that an author "dedicate" a certain portion of his work to the public in return for his statutory protection.

99. *Baker v. Selden*, 101 U.S. 99 (1880).

100. "Writers of books would be deprived of the proper growth in knowledge, and from taking advantage of the position to which earlier writers had carried the science under consideration." *West Pub. Co. v. Edward Thompson & Co.*, 169 F. 833, 866 (E.D.N.Y. 1909).

of fair use cannot, however, be used under this theory to justify the lifting of entire scenes from a dramatic work.<sup>101</sup>

The extent of the application of the fair use doctrine in this area is indicated by one court as follows: "[T]his doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter."<sup>102</sup> This latitude is well established<sup>103</sup> and comprehends such areas as law,<sup>104</sup> medicine,<sup>105</sup> science,<sup>106</sup> history<sup>107</sup> and biography.<sup>108</sup>

Furthermore, it seems the courts will go a long way to find that a particular field is scientific or professional. In *Simms v. Stanton*<sup>109</sup> it was stated that "physiognomy, the art of reading faces, deserved recognition as a science,"<sup>110</sup> and the court found that there was a fair use made of the plaintiff's work on the subject. In any event, the court's characterization of a work as scholarly or news or the like is an extremely significant and often decisive factor.<sup>111</sup>

One of the most difficult problems is the characterizing of scholarly works in the law book field<sup>112</sup> where similar cita-

101. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947) (series of 57 consecutive comedy scenes, constituting 20% of the feature, were appropriated; claim of "borrowing ideas" was denied); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 397 (1940) (taking represented the entire development of a play).

102. *Thompson v. Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950).

103. "With reference to works in regard to the arts and sciences, using those words in the broadest sense . . . [a]uthors are sometimes entitled, indeed, *required* to make use of what precedes them in the precise form in which last exhibited . . ." (emphasis added). *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905).

104. *See, e.g.*, *Callaghan v. Myers*, 128 U.S. 617 (1888); *see W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928); *West Pub. Co. v. Edward Thompson & Co.*, 176 F. 833 (2d Cir. 1910).

105. *See, e.g.*, *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

106. *See, e.g.*, *Simms v. Stanton*, 75 F. 6 (C.C.N.D. Cal. 1896).

107. *See, e.g.*, *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir. 1957).

108. *See, e.g.*, *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950).

109. 75 F. 6 (C.C.N.D. Cal. 1896).

110. *Id.* at 10. *See also Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 604 (2d Cir. 1957), where the court treated a TRUE MAGAZINE article on the death of Lincoln as an "historical writing."

111. *See Thompson v. Gernsback*, 94 F. Supp. 453 (S.D.N.Y. 1950).

112. *See Loew's, Inc. v. CBS, Inc.*, 131 F. Supp. 165, 175, (S.D. Cal. 1955) (decisions called "somewhat confusing" by Judge Carter); *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd mem. by an equally divided Court sub. nom. CBS v. Loew's, Inc.*, 356 U.S. 43 (1958).

tions<sup>113</sup> and case lists<sup>114</sup> are found in two or more legal books.<sup>115</sup> The problem arises, in part, from the necessity of categorizing the various legal publications according to the nature of the work—that is, determining whether they are professional textbooks or whether they are mere case digests or compilations. In the latter event, even the verification of the original case list will not screen the defendant from liability under the doctrine of fair use.<sup>116</sup> It is suggested that from a policy standpoint it is sound to permit greater appropriation from textbooks and treatises than from mere case digests and compilations.<sup>117</sup>

The fact that the case digests, containing case lists and annotations, are in direct competition with each other is another reason for limiting the copying of case lists and annotations from prior works. A compilation by necessity does not afford an opportunity for variety in the statement of the information recorded; moreover, it is difficult to avoid mere copying. The issue resolves itself into the following: What independent work did subsequent compilers do to acquire the requisite material? Despite allowing a subsequent compiler to make limited use of the original compilation as a source<sup>118</sup> or check,<sup>119</sup> it seems he must disregard the assistance of the original compilation after using it as a means of verification.<sup>120</sup> One court viewed these cases as resting

more upon the idea of unfair use, and the unlawful saving

113. See, *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903).

114. See *White v. Bender*, 185 F. 921 (C.C.N.D.N.Y. 1911).

115. See *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928); *West Pub. Co. v. Edward Thompson & Co.*, 176 F. 833 (2d Cir. 1910); *Edward Thompson & Co. v. American Law Book Co.*, 122 F.2d 922 (2d Cir. 1903); *West Pub. Co. v. Lawyers Co-op Pub. Co.*, 79 F. 756 (2d Cir. 1897).

116. *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

117. In *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 89 (6th Cir. 1928), it was said that

greater latitude is to be expected in the case of authors consulting other text books or using directories and lists than in the case of one compiler attempting to make use of another similar compilation.

118. See *Social Register Ass'n v. Murphy*, 128 F. 116 (C.C.D.R.I. 1904) *cf.* *Conde Nast Publications, Inc. v. Vogue School of Fashion Modeling, Inc.*, 105 F. Supp. 325 (S.D.N.Y. 1952).

119. See *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906).

120. *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905); see *Hartford Printing Co. v. Hartford Directory & Publishing Co.* 146 F. 332 (C.C.D. Conn. 1906), which called for an independent effort.

of labor in order to avoid the necessary original research than upon the appropriation of any literary ideas or arrangement, based upon literary ability and studied plan.<sup>121</sup>

That this has been a troublesome area is evidenced by the split in authority.<sup>122</sup>

It may be that the key issue in each case centers around the nature of the infringing work. In *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*,<sup>123</sup> the court held that the defendant's use of three sentences from a scientific treatise in an advertisement was not for scholarly purposes for which the plaintiff's consent might be implied:

[The defendant's] publication was not one in the field in which Dr. Felderman wrote, nor was it a scientific treatise or a work designed to advance human knowledge. On the contrary, it is clear that its pamphlet intended to advance the sale of its product—Chesterfield cigarettes—a purely commercial purpose.<sup>124</sup>

*Literary and Dramatic Reviews and Commentaries.* By far the most common application of the fair use doctrine occurs in situations in which material has been appropriated for use in literary and dramatic reviews and commentaries.<sup>125</sup> Mr. Justice Story, in 1841, said: "[N]o one can doubt a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for purposes of fair and reasonable criticism."<sup>126</sup> It was early recognized in England that quoting the exact text for the purpose of criticism was a fair use.<sup>127</sup> Use of copyrighted work for critical purposes doesn't seem to be confined to literary criticism only; this type of fair use also extends to dramatic criticism, editorial com-

121. *West Pub. Co. v. Edward Thompson & Co.*, 169 F. 833, 853 (C.C.E. D.N.Y. 1909), *modified* 176 F. 833 (2d Cir. 1910).

122. *Compare* *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905) *with* *Edward Thompson & Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903). At least independent effort and judgment must be exercised. *List Pub. Co. v. Keller*, 30 F. 772 (C.C.S.D.N.Y. 1887); *cf.* *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922).

123. 23 F. Supp. 302 (E.D. Pa. 1938).

124. *Id.* at 304; *accord*, *Thompson v. Gernsback*, 94 F. Supp. 453 (S.D.N.Y. 1950).

125. See ADMUR, COPYRIGHT LAW AND PRACTICE 757 (1937).

126. *Folsom v. Marsh*, 2 F. Cas. 342, 343 (No. 4,901) (C.C.D. Mass. 1841).

127. *Bell v. Whitehead*, 8 L.J. (n.s.) 141 (1839).

ment, and to mimicry and parodies.<sup>128</sup> In *Lawrence v. Dana*,<sup>129</sup> Mr. Justice Clifford, following *Folsom v. Marsh*<sup>130</sup> faithfully, stated the principle of this application thusly:

Reviewers may make extracts sufficient to show the merits, or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient [extracts] may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed.<sup>131</sup>

*Lawrence v. Dana* states the two most important factors<sup>132</sup> in fair use: (1) the value of the copied portion of the work and (2) the review's effect as tending to supersede or become a substitute for the original. The test does not place a limit on the quantity taken; a quoted amount is permissible if it enables the reviewer to evaluate the work.<sup>133</sup> The criterion is sometimes stated to be whether the review has copied so much that it will reduce the demand for the original.<sup>134</sup> The reduction in demand must result from the fact that the criticism discloses too fully the contents of the original, but not because it is adverse.<sup>135</sup> For instance, when the defendant copied word lists for use by students, the use was not fair because both works met the same marked demand and "defendant's copying was unquestionably to avoid the trouble or expense of an independent work."<sup>136</sup> This reduction

128. *Shapiro, Bernstein & Co., Inc. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934) (dictum). "Dramatic criticism is one of the most common forms of 'fair use.' Mimicry, editorial comment, and parodies are other varieties or instances of 'fair use.'" *Id.* at 42. However, it is doubtful whether mimicry and parody are automatically accepted by the courts as an instance of fair use.

129. 15 F. Cas. 26 (No. 8,136) (C.C.D. Mass. 1869). For the background on this case see HICKS, MEN AND BOOKS FAMOUS IN THE LAW 223-34 (1921).

130. 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841). This case, following the English cases, did not place a limit upon the quantity to be used. The quoted amount is permissible if sufficient to enable the commentator to analyze correctly the work. Subsequent cases have emphasized this point.

131. *Lawrence v. Dana*, 15 F. Cas. 26, 60 (No. 8,136) (C.C.D. Mass. 1869).

132. See also *Story v. Holcombe*, 23 F. Cas. 171, 173 (No. 13,497) (C.C.D. Ohio 1847); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (No. 4,901) (C.C.D. Mass. 1841); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914); *Bell v. Whitehead*, 8 L.J. (n.s.) 141 (1839); *Wittingham v. Wooler*, 36 Eng. Rep. 679 (1817).

133. *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841). See note 138 *supra*.

134. *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914).

135. *Id.*

136. *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941).

in demand factor seen here is in reality an "economic detriment" test and is often used as a measurement of substantial appropriation in infringement cases,<sup>137</sup> though more properly relegated to the question of fair use.

Greater freedom is permitted writers in unrelated fields than is permitted competitors.<sup>138</sup> Even so, the courts seldom find fair use where the material is used for commercial gain, rather than an artistic purpose. In one case, the use of three sentences from a medical book for the purpose of advertising was held unfair because of the importance of the material.<sup>139</sup> If the copied portion is necessary for a review or criticism of a book in other publications, the use is fair, regardless of the quantity taken; but if the appropriation stems from the desire for commercial benefit, the use is unfair, again regardless of quantity.<sup>140</sup> This distinction is grounded on the theory that an author invites reviews and comments; they are necessary to the success of his work, and if the work is scientific, others may build upon it as a basis for further progress. Neither is involved when the appropriation is made to secure financial gain to the borrower.

The case of *Alexander v. Irving Trust Co.*<sup>141</sup> presents an element not usually involved in the determination of fair use as it relates to editorial comment and criticism. In this case the plaintiff alleged that a two-page article she had caused to be published in a medical journal, entitled *Oliver Wendell Holmes, Psychiatrist*, was infringed by the defendant's 270-page book entitled *The Psychiatric Novels of Oliver Wendell Holmes*. The court found no appropriation; at most there was a borrowing of ideas.<sup>142</sup> The usual determination of fair use concerns the originator of certain work and the borrower. Here, the

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137. This appears to have come into the substantial appropriation area through the citation of fair use cases in questions of infringement. For example, the simple infringement case of *Universal Pictures Corp. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947) cites the familiar fair use case of *West Pub. Co. v. Edward Thompson & Co.*, 169 F. 833 (E.D.N.Y. 1909). Some courts have used substantial appropriation and fair use as the same thing. See e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

138. See note 118 and accompanying text *supra*.

139. *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938). See text at note 124, *supra*.

140. *Id.* There is also a fair use when the material is appropriated for use in the advancement of scientific knowledge. E.g., *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905).

141. 132 F. Supp. 364 (S.D.N.Y. 1955), *aff'd per curiam*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956).

142. *Id.* at 369.

court seems to indicate that the statements were “a fair use of comments”<sup>143</sup> in that they did not injure “third-parties’”<sup>144</sup> (plaintiffs’) rights. This determination of fair use seems more akin to tort law than to copyright law.<sup>145</sup>

In sum, it is clear that the right of comment and criticism is limited to what is reasonable. The leading case is *Folsom v. Marsh*,<sup>146</sup> in which the Reverend Charles W. Upham derived over forty per cent of his *Life of Washington in the Form of an Autobiography* from Jared Spark’s twelve-volume masterpiece, *Writings of President Washington*. In answer to the defendant’s assertion that the use was for the purpose of criticism, Mr. Justice Story pointed out that if important parts of the original were taken, not for the purpose of criticism, but for the purpose of superseding the work, it would constitute “a piracy pro tanto.”<sup>147</sup> A finding of unfair use is often made in cases in which the new work will tend to become a substitute for the original with the resulting unjust deprivation of the original author’s rights.<sup>148</sup> But criticism used as cover for substantial appropriation for commercial purposes where the critique is only incidental or even unintended is in a different category.<sup>149</sup>

*Incidental Use.* The courts have also applied the fair use doctrine where the original work was used in a purely incidental manner. In *Karll v. Curtis Publishing Co.*,<sup>150</sup> the court found an implied “invitation” to use a copyrighted song which had been dedicated to the Green Bay Packers professional football team and adopted as the team’s official fight song. In an article in the *Saturday Evening Post* about the team, the song was referred to and the eight lines of the chorus reproduced. In granting a motion to dismiss, the court said that the article did not compete with the song, nor was the value

143. *Id.*

144. *Id.*

145. The privilege of fair comment or criticism in copyright law is analogous to the libel and slander law privilege of fair comment on things of public concern. For a discussion of the libel and slander privilege see W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 109, 110 (3d ed. 1964).

146. 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

147. *Id.* at 343.

148. See *Macmillan v. King*, 223 F. 862 (D.C. Mass. 1914); *Ginn & Co. v. Apollo Pub. Co.*, 215 F. 772 (E.D. Pa. 1914).

149. *Sayers v. Spaeth*, COP. OFF. BULL. (No. 20,625) (S.D.N.Y. 1932); *Campbell v. Scott*, 59 Eng. Rep. 784 (1842); *University of London Press v. University Tutorial Press*, [1916] 2 ch. 601; *Smith v. Chatto*, 31 L.J. (n.s.) 775 (1874).

150. 39 F. Supp. 836 (E.D. Wis. 1941).

of the song diminished since the author impliedly "consented to a reasonable use thereof associated with the Packers."<sup>151</sup>

Similarly, the *New Yorker* published a story upon the death of silent screen star Pearl White and quoted twelve lines from the chorus of a humorous song entitled *Poor Pauline*, which had been associated with the actress. In *Broadway Music Corp. v. F-P Publishing Corp.*<sup>152</sup> the use was found to be a fair one even though it constituted most of the article. These factors were considered: (a) the extent and relative value of the extract, (b) the purpose of the borrowing work, (c) the quoted portions used as a substitute for the original, and (d) the effect on the distribution of the original work.<sup>153</sup>

In another case where the copied material was used only incidentally in the borrowing work, the court held that the use of a popular song to set the mood for a short story was fair use.<sup>154</sup> "There could not have been any direct falling off of the sales of the printed copies of the song,"<sup>155</sup> reasoned the court, "because of any competition from this story."<sup>156</sup>

*Personal or Private Use.* May one appropriate copyrighted materials for purposes of private and personal use? Professors Kaplan and Brown conclude that when one makes a handwritten copy for personal purposes he does not infringe the copyright.<sup>157</sup> One writer has stated "private use is completely outside the scope and intent of restriction by copyright."<sup>158</sup>

A different matter presents itself when the issue is whether a library may reproduce a work in order to make it available to users of the library.<sup>159</sup> Another variation is where an individual for his private enjoyment tape records a copyrighted musical composition.<sup>160</sup> Latman poses the problem as follows:

151. *Id.* at 837.

152. 31 F. Supp. 817 (S.D.N.Y. 1940).

153. *Id.* at 818.

154. *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934).

155. *Id.* at 41.

156. *Id.*

157. KAPLAN & BROWN, *CASES ON COPYRIGHT* 314 (1960); see Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMPOSIUM 43, 58 (1955). But cf. WEIL, *AMERICAN COPYRIGHT LAW* 406 (1917).

158. Shaw, *Publication and Distribution of Scientific Literature*, 17 COLLEGE AND RESEARCH LIBRARIES 294, 301 (1956).

159. See KAPLAN & BROWN, *CASES ON COPYRIGHT* 314 (1960).

160. See *id.* at 314, n.1.



The increasing use of photoduplication processes will undoubtedly require continuing attention to the area. . . . It may well be . . . that the purpose and nature of a private use, and in some cases the small amount taken, might lead a court to apply the general principles of fair use in such a way as to deny liability.<sup>161</sup>

Because of the lack of authority in this area, it is not certain what the trend will be.

*Parody and Burlesque.* The terms parody and burlesque are used interchangeably<sup>162</sup> although there are technical differences between the two. Parody has been defined as follows:

A writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated.<sup>163</sup>

The same lexicographer defines burlesque this way:

A literary composition or dramatic representation that ridicules something, usually the serious and dignified . . . but sometimes the trivial and commonplace . . . by means of grotesque exaggeration or comic imitation.<sup>164</sup>

While a parody follows closely the style of the author, applying lofty phrases to inconsequential subjects, burlesque is simply travesty and distortion.<sup>165</sup> The essence of both is criticism through making fun of the writer, characters or incidents of the work which is the subject. The terms will be considered synonymous for the purposes of this paper.

161. Latman, *Fair Use of Copyrighted Works, Study No. 14* in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE COMMITTEE ON THE JUDICIARY, 86th CONG., 1st SESS. 12 (1958).

162. See *Loew's, Inc. v. C.B.S.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd mem. by evenly divided Court sub nom. C.B.S. v. Loew's, Inc.*, 356 U.S. 43 (1958). See also, *Columbia Pictures Corp. v. N.B.C.*, 137 F. Supp. 348 (S.D. Cal. 1955).

163. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (1961). See also KITCHIN, *SURVEY OF BURLESQUE AND PARODY IN ENGLISH* (1931); WELLS' *PARODY ANTHOLOGY* XXV (1904).

164. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 299 (1961).

165. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1131 (1955).

Cases involving parody and burlesque are scant in number and most of these opinions are unenlightening.<sup>166</sup> At least three of the cases in this area involved a mimicry or "take-off" which, strictly speaking, was not a use of a copyrightable component part of a work at all.<sup>167</sup>

In a later case<sup>168</sup> a stage presentation entitled *Nutt and Griff*, imitating the cartoon characters Mutt and Jeff, was held to be an infringement. Defendant claimed his performance was privileged as a parody. In granting an injunction the court said:

A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures or suggestions. It is not always easy to say where the line should be drawn between the use for which such purposes is permitted and that which is forbidden.

One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as [*sic*] has been reproduced as will materially reduce the demand for the original. . . . The reduction in demand . . . must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.<sup>169</sup>

Such reduction in demand was found here.<sup>170</sup>

166. Superficial approaches to the problem were made in *Hill v. Whalen & Martell Inc.*, 220 F. 359 (S.D.N.Y. 1914); *Green v. Mingsheimer*, 177 F. 286 (C.C.N.Y. 1909); *Green v. Luby*, 177 F. 287 (C.C.N.Y. 1909); *Bloom v. Nixon*, 125 F. 977 (C.C. Pa. 1903); *Glyn v. Weston Feature Film Co.*, [1916] 1 ch. 261. See also CLARKE, COPYRIGHT AND INDUSTRIAL DESIGN 63, 83 (1951); COPINGER & SKONE, LAW OF COPYRIGHT 129, 131-32 (8th ed. 1948); 8 HALSBURY'S LAWS OF ENGLAND § 786, at 433m, n.(d) (3d ed. Lord Simonds 1954); WEIL, AMERICAN COPYRIGHT LAW §§ 1134, at 430 & 1142 at 432 (1917).

167. *Green v. Luby*, 177 F. 287 (S.D.N.Y. 1909); *Green v. Mingsheimer*, 177 F. 286 (S.D.N.Y. 1909); *Bloom v. Nixon*, 125 F. 977 (E.D. Pa. 1903).

168. *Hill v. Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914).

169. *Id.* at 360.

170. *Nutt and Griff* was outright imitation of the original; another court has interpreted this case as finding direct reproduction. *King Features Syndicate v. Fleisher*, 299 F. 533, 536 (2d Cir. 1924) (Copyright of a cartoon featuring "Barney Google and Spark Plug" or "Sparky" [a horse] infringed by a doll called "Sparky", an exact reproduction of the cartoon horse). See

Two recent cases involving television burlesque or skits of movies constitute the real case law on the question of burlesque being a fair use. In *Loew's Inc. v. CBS*,<sup>171</sup> an injunction was granted enjoining Jack Benny from parodying the movie *Gaslight* on his television program. The court concluded that there had been a substantial taking from plaintiff's original work, and from this infringement was found. District Judge Carter, speaking for the court, seemed to place undue stress upon the fact that defendants were using the burlesque "for commercial gain in a competing entertainment field."<sup>172</sup> Judge Carter concluded:

Plaintiff's have a property right in "Gaslight" which defendants may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking; that parodized or burlesque taking is to be treated no differently from any other appropriating; that as in all other cases of alleged taking, the issue becomes first one of fact, *i.e.*, what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.<sup>173</sup>

Although the holding for plaintiff could have been based on the ground that the burlesque was a mere subterfuge for appropriating the original work, this was not stated in the opinion.<sup>174</sup> Rather, the theory was that there could be no immunity on the ground of fair use and that parody must be treated in the same manner as a serious taking.<sup>175</sup> A rigid application of this theory would make parody and burlesque an infringement in nearly every case. In the appropriation of

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Note, *The Protection Afforded Literary and Cartoon Characters*, 68 HARV. L. REV. 349, 356-63 (1954).

[Cartoons] are the most advantageous form in which to embody anything designed for copyright . . . , [for] what is being protected in these cartoon by-product cases is neither an idea, a character, nor a design but a popularity value, a sort of psychological property.

Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932, 939 (1939).

171. 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956); *aff'd mem. by an equally divided Court sub nom. CBS v. Loew's*, 356 U.S. 43 (1958).

172. *Id.* at 182.

173. *Id.* at 183.

174. See Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1149-50 (1955).

175. 131 F. Supp. 165, 182 (S.D. Cal. 1955).

176. See, e.g., *Chappell & Co. v. Fields*, 210 F. 864, 865 (2d Cir. 1914).

serious material, the taking of two or three scenes is an infringement.<sup>176</sup> If the doctrine of fair use is eliminated from the parody situation and the usual rules applied, all parody and burlesque would necessarily have to be considered infringement per se. The parody "would inevitably have to be cast in the form of the original."<sup>177</sup> If the original is not recognized in the parodying work as it is, there is no parody at all, or at the most, an extremely poor one. If the original is not recognized by the audience, it is not possible to mock, spoof or poke fun at it; the basis of the humor is destroyed. If the test normally applied to serious work were applied to parody, it would eliminate altogether true parody and burlesque. In any case, it would severely limit the fair use concept, and then the literary history of parody and burlesque would lose all meaning.

The court placed undue stress upon the fact that defendants were using the burlesque for commercial purposes.<sup>178</sup> Commercial gain through parody goes back to the beginnings of the form itself. The fact that the property value of the holder has risen greatly in value in modern times, and similarly, that the parody or burlesque will command much greater remuneration for its creator, should not obscure the primary consideration of the Copyright Act which is to promote the progress of arts and sciences. Financial gain to the copyright holder is not primary, but secondary, in light of this policy.

Although commercial factors are certainly considered in questions of infringement, the better view would seem to be that the doctrine of fair use should be applied where there is slight likelihood of economic detriment to the original author or where the value of the borrowing work is sufficient to justify any detriment.<sup>179</sup> The parody situation appears to justify the application of fair use. In the "Gaslight" case, for example, any proof tending to show that the parody affected adversely the rentals of the film<sup>180</sup> was so speculative that it is useless to consider it. As there was no direct competition between

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177. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1144-45 (1955).

178. 131 F. Supp. 165, 182, 184 (S.D. Cal. 1955).

179. The use of this test alone would deny recovery to the plaintiff where the circumstances prevented his proving economic injury, even though there may have been appropriation. However, this test has some significance since a stimulus to artistic production is within the constitutional policy.

180. Damages, if any, would have to be to foreign distribution and to re-issue value of the picture.

the two works, any likelihood of actual impairment of sales resulting in economic detriment to the plaintiff was remote. In reality, the publicity received through the parody probably enhanced the value of the property.

The second case, *CBS v. NBC*,<sup>181</sup> which was tried in the same court with the same judge, involved a Sid Caesar skit entitled *From Here to Obscurity*, which was a burlesque of the motion picture *From Here to Eternity*. Caesar's reliance upon the form and substance of the original was not so extensive as was Benny's; however, setting, general situation, underlying themes and plots, and details of development of the story line were used and obviously recognizable in the parody.<sup>182</sup> The plot of the skit, combining two of the underlying themes of the movie, was changed in vital respects to conform to the comic purpose of the parody. Plot, sequence, and story development differed in many respects in the two works. Dialogue differed greatly. The court found no infringement.

*News and Other Commercial Uses.* In moving from the personal or private use cases to the parody and burlesque area, it can be seen that as we approach the latter end of the spectrum, appropriation will generally be more restricted. This is because in the courts' eyes, commercial and competitive factors are more prevalent here.

In a case in which a book giving the history of popular music in the United States contained the words and melody line of a copyrighted song, it was held that the book provided a substitute for the song, even though the song was no longer popular, and, therefore, the use was not fair.<sup>183</sup> An easier case, denying the defense of fair use, involved the copying of a chorus of a copyrighted song belonging to a rival and competing publishing company.<sup>184</sup>

Although news itself is not the subject of copyright,<sup>185</sup> the rights in an interpretive newspaper article concerning the hopes of Germany during the First World War was infringed by an

181. 137 F. Supp. 348 (S.D. Cal. 1955).

182. *Id.* See text accompanying note 177 *supra*. See also Schvin, *Parody and Burlesque of Copyright Works as Infringement*, 6 BULL. COPV. SOC. 53 (1958).

183. *Sayers v. Spaeth*, COPV. OFF. BULL. (No. 20,625) (S.D.N.Y. 1932).

184. *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939).

185. *Cf. Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938).

article which expounded the same ideas and used the same literary style.<sup>186</sup>

In *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*,<sup>187</sup> the defendants, owners of a nonprofit radio station devoted to educational and cultural purposes, claimed that the broadcasting of plaintiff's copyrighted musical composition was for the ultimate purpose of raising funds for a charitable organization set up in honor of a late labor leader. The court held that the lofty aims of the corporation did not prevent the broadcast from constituting a "public performance for profit."<sup>188</sup> It was found that the money for the fund was to come in part from the radio station's profits and that the broadcast was for the purpose of building up a listening audience so that profits might be realized.<sup>189</sup>

It has been suggested that this case "may demonstrate the difficulty in establishing the absence of any commercial motive."<sup>190</sup> At the same time "a finding of fair use will not be compelled by the fact that the defendant seeks no profit from the operation."<sup>191</sup>

### III. AN ANALYSIS BY THE FAIR USE APPROACH

What constitutes fair use is an issue of fact,<sup>192</sup> but what facts will be sufficient to raise this defense in any given case is not easily answered because the doctrine is a vague concept and its limits are not clear. It is important that one be able to

186. *Chicago Record-Herald Co. v. Tribune Ass'n.*, 275 F. 297 (7th Cir. 1921). In *New York Tribune, Inc. v. Otis & Co.*, 39 F. Supp. 67 (S.D.N.Y. 1941). The defendant's intent and the effect of his publication on plaintiff's work where he had photo-stated an entire editorial were examined to determine fair use. Relief for unfair competition arising out of the appropriation of news was recognized in the leading case of *I.N.S. v. A.P.*, 248 U.S. 215 (1918).

187. 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd* 141 F.2d 852 (2d Cir. 1944).

188. Copyright Law, 17 U.S.C. § 1(e) (1952).

189. In affirming the district court decision the court of appeals suggested that

[t]here can be no doubt that the portion of the plaintiff's composition which was broadcast which amounted to about a quarter of his entire work and was reproduced to aid in building up a listening audience does not come within the definition of "fair use".

141 F.2d 852, 855 (2d Cir. 1944). See also Comment, *Copyrights and T.V.—A New Use for the Multiple Performance Theory*, 18 U. CHI. L. REV. 757 (1951).

190. Latman, *Fair Use of Copyrighted Works*, Study No. 14 in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE COMMITTEE ON THE JUDICIARY, 86 Cong., 1st Sess. 13 (1958).

191. *Id.*

192. *Eisenschiml v. Fawcett Pub., Inc.*, 246 F.2d 598 (7th Cir. 1957).

predict from a consideration of all the evidence when the doctrine of fair use will be involved. Judge Yankwich put it this way:

If the amount reproduced is legitimately necessary to review the book, or is a part of a scientific or other exposition of the subject, in which the theories expounded by others must be discussed, the use, *regardless of quantity*, is fair. If, on the other hand, the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, *regardless of quantity*, is unfair.<sup>193</sup>

The rule may be no more precise than the application of the Golden Rule to the fact situation: "Take not from others to such an extent and in such a manner that you would be resentful if they so took from you."<sup>194</sup>

Since the doctrine is an equitable one which goes beyond the rights and wishes of the copyright proprietor and includes a consideration of the public interest, one must look for a mechanical rule to guide the courts in differentiating between infringement and fair use and in establishing the boundary line between the two. The difference ultimately resolves itself into the application of broad and indefinite principles or criteria to the particular circumstances encountered in each case. A test often quoted is that of Mr. Justice Story in *Folsom v. Marsh*:

We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the material of the original work may be fused . . . into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot be fairly treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture

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193. Yankwich, *What is Fair Use*, 22 U. CHI. L. REV. 201, 208-09 (1954).

194. McDonald, *Non-Infringing Uses*, 9 BULL. COPY. SOC. 466, 467 (1962).

of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy.<sup>195</sup>

The cases indicate that there are nine elements which bear on the determination: (1) the nature of plaintiff's material and his intention, (2) the type and purpose of the use involved, (3) the quantitative extent of material used, (4) the qualitative extent of material used, (5) the intent with which the material was used, (6) the effect on the original material, (7) the amount of the user's labor involved, (8) the benefit to the user, and (9) the manner by which the copying was accomplished.

*The Nature of Plaintiff's Material and His Intention.* The privilege of fair use is very much related to the nature of plaintiff's material and his intention. For example, fair use of materials is given the widest berth in the areas of science and the arts where it is necessary for subsequent authors to work from earlier writing. The doctrine is very restricted in areas of competing publications treating the same subject, broadening out again if the two works are dissimilar in scope, content and purpose.<sup>196</sup>

The privilege will be greater in scholarly works than in commercial publications.<sup>197</sup> In *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*,<sup>198</sup> the commercial element was decisive, although the works were completely dissimilar and not competitive. In this case a doctor had written a book entitled *The Human Voice, Its Care and Development*, which was copyrighted by the plaintiff. The defendant put out a booklet on cigarettes and quoted three lines of the doctor's book to the effect that tobacco, when properly used, has no deleterious ef-

195. 9 F. Cas. 342, 348 (No. 4,901) (C.C.D. Mass. 1841). Another test frequently paraphrased is that of Judge Clifford, in *Lawrence v. Dana*, 15 F. Cas. 26, 61 (No. 8,136) (C.C.D. Mass. 1869).

Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury yet equity will not interpose by injunction to prohibit further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a well-founded doubt as to the legal title . . . .

196. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 261 (1944).

197. See text beginning at note 96 *supra*. It may be wise to reconsider the distinctions made in *W. H. Anderson Co. v. Baldwin Law Pub. Co.* 27 F.2d 82, 89 (6th Cir. 1928) and *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905).

198. 23 F. Supp. 302 (E.D. Pa. 1938).



fect. The court refused to apply the doctrine of fair use, holding that there was an appropriation by the cigarette company of the conclusions and labors of the doctor which constituted an infringement of his copyrighted work.

If the presumed intention of the writer is to allow certain uses of his work or to provide a model for copying, he should not be allowed to object to its being used for the purpose for which it was produced.<sup>199</sup> This factor of intent should be considered in tandem with the nature of the author's work.

*The Type and Purpose of the Use Involved.* The type of use involved is a decisive factor. The courts have uniformly recognized that a copyrighted work may be subject to fair use in criticism and review<sup>200</sup> and that it may also be commented on and quoted without permission insofar as may be necessary to make the comment coherent.<sup>201</sup> The problem can be appreciated by considering this statement:

Reviewers may make extracts sufficient to show the merits or demerits of the original work, but they cannot so exercise the privilege as to supersede the original book. . . . The privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the work reviewed.<sup>202</sup>

Courts are inclined to some greater degree of liberality toward the user in cases involving works designed and intended for some reproductive use by others, such as dictionaries, digests, statistical compilations and the like.<sup>203</sup> They do so from the feeling that the nature or character of the work is somewhat of an invitation to others to use it in the way and for the purpose that it was designed and published.<sup>204</sup> However, when

199. 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC MATERIAL* 805 (1938). See *Ager v. Peninsular & Oriental Steam Navigational Co.*, [1884] 26 ch. 637 (handwriting copybook); *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941) (form book). *Contra*, *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

200. See text beginning at note 118 *supra*.

201. See Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT LAW SYMPOSIUM 43 (1955).

202. *Lawrence v. Dana*, 15 F. Cas. 26, 61 (No. 8,136) (C.C.D. Mass. 1809).

203. See *West Pub. Co. v. Edward Thompson & Co.*, 169 F. 833 (C.C.E.D.-N.Y. 1910), modified 176 F. 833 (2d Cir. 1910); *Webb v. Powers*, 29 F. Cas. 511 (No. 17,323) (1847).

204. Cf. *Baker v. Selden*, 101 U.S. 99, 102-93 (1879); *Karl v. Curtis Pub. Co.*, 39 F. Supp. 836, 837-38 (E.D. Wis. 1941); *Towle v. Ross*, 32 F. Supp. 125, 127, n. 21 (D.C. Ore. 1940); *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541-42 (1st Cir. 1905).

the court enunciates the criteria or tests they profess to be guided by, they list the same tests which they resort to in the run of the mill case of literary or dramatic plagiarism.<sup>205</sup>

*The Quantitative Extent of Material Used.* The quantitative extent of material used is relevant in determining whether there has been an infringement and in determining whether there has been a fair use made of the copyrighted material. When quantity is used as a factor in determining whether there has been a fair use, it is not as important a consideration as other factors such as the qualitative content of the portion taken.

Wholesale copying, however, without the presence of other factors has been used as a single standard:

Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.<sup>206</sup>

According to another court: "One cannot copy the substance of another's work without infringing his copyright."<sup>207</sup>

In *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*,<sup>208</sup> although only three sentences were extracted from the copyrighted work, they comprised five per cent of the user's work. Unless other factors make the use privileged, it seems the user is getting something valuable for nothing.<sup>209</sup>

*The Qualitative Extent of Material Used.* In *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*,<sup>210</sup> the court stated that the criteria for determining fair use included the "relative value of the extract."<sup>211</sup> Qualitative extent or value must depend not only on the relative sizes of the two works,<sup>212</sup> but also on the significance of the material as representing the heart or crux of the original. In another case magazine covers were repro-

205. See, e.g., *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84-85 (6th Cir. 1943).

206. *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937).

207. *Loew's, Inc. v. Benny*, 239 F.2d 532, 537 (9th Cir. 1956), *aff'd mem. by an equally divided Court sub nom. C.B.S. v. Loew's, Inc.*, 356 U.S. 43 (1958).

208. 23 F. Supp. 302 (E.D. Pa. 1938).

209. *But see Broadway Music Corp. v. F-R Pub. Co.*, 31 F. Supp. 817 (S.D.N.Y. 1940).

210. 26 U.S.P.Q. 40 (S.D.N.Y. 1941).

211. *Id.* at 43.

212. This qualification factor ties in with the quantitative. This point was made clear in the case of *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

duced for use in circulars describing the defendant's modelling school. Here the court noted: "Its very essence—the picture of the model—was [used], as was also the title."<sup>213</sup> Where part of the author's Russian language chart was incorporated into another's book on Russian, it was held material that the chart contained a unique method of teaching the pronunciation of the Russian alphabet.<sup>214</sup>

*The Intent with which the Material Was Used.* The state of mind of the user, ordinarily immaterial to the determination of infringement,<sup>215</sup> is relevant to the question of fair use.<sup>216</sup> It was stated in the early case of *Lawrence v. Dana*<sup>217</sup> that evidence of innocent intention may have a bearing upon the question of fair use. It has been suggested that the innocent intention in this context may be synonymous with "good faith."<sup>218</sup>

There are many cases which manifest the importance of innocent intention. In order for parody or burlesque to be a fair use, it must be in good faith; that is, the imitation must not be for the purpose of evading the owner's copyright by presenting the song or other work under the disguise of parody or burlesque.<sup>219</sup> In *New York Tribune, Inc. v. Otis & Co.*,<sup>220</sup> the possible intent of the defendant to use the plaintiff's editorial in a non-commercial manner was recognized by the court as a significant issue of fact requiring denial of a motion for summary judgment. It is important to note that if a court holds that the use involved was fair, although it may say that intent is not an element, it will usually observe that there was no intent to infringe. Therefore, intent to infringe is not essential

213. *Conde Nast Publications v. Vogue School of Fashion Modelling, Inc.*, 105 F. Supp. 325, 333 (S.D.N.Y. 1952).

214. *Nikanov v. Simon & Schuster*, 144 F. Supp. 375 (S.D.N.Y. 1956), *aff'd*, 246 F. 501 (2d Cir. 1957). See also BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 335 (1944); 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 811 (1938).

215. *Buck v. Jewell-Lasalle Realty Co.*, 283 U.S. 191 (1931).

216. See Peck, *Copyright-Infringement of Literary Works*, 38 MARQ. L. REV. 180, 187 (1955).

217. 15 F. Cas. 26 (No. 8,136) (C.C.D. Mass. 1869).

218. Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT LAW SYMPOSIUM 43, 60 (1955).

219. See text following note 163 *supra*.

220. 39 F. Supp. 67 (S.D.N.Y. 1941).

to the wrong,<sup>221</sup> but it is a factor to be considered, especially if equitable relief is sought.<sup>222</sup>

*The Effect on the Original Material.* The courts have given great weight to the effect of the appropriated work on the original material. The test, for example, as applied to a copyrighted work which is subject to fair use in the way of review and commentary<sup>223</sup> is whether the subsequent piece "will materially reduce the demand for the original,"<sup>224</sup> not by reason of adverse criticism but because the publication so fully discloses the contents of the book. I suggest that this test shades into the question of qualitative extent.<sup>225</sup>

The same issue is present in the parody and burlesque field.<sup>226</sup> In short, a parody or burlesque of a literary work, which textually reproduces a few lines in a burlesque setting is a fair use, provided that it does not prejudice the sale, diminish the profits or supersede the objects of the original work.<sup>227</sup>

The absence of music may preclude impairment of the value of a copyrighted musical composition. Thus, where portions of the lyrics were used as background for the action in a short story,<sup>228</sup> or in connection with a magazine article about the professional football team for whom the song was written,<sup>229</sup> no liability for infringement was incurred. A contrary result was reached, however, where all the lyrics as well as the melody line of a copyrighted song were included in a narrative history of popular songs in the United States.<sup>230</sup> How perfect a substitute is the appropriation? The nearness may be material in determining fair use.

221. See 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 816 (1938); *Chappell & Co. v. Costa*, 45 F. Supp. 554, 555 (S.D.N.Y. 1942). See also *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950); *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40; *COPY. OFF. BULL.* (No. 20,656) 660 (S.D.N.Y. 1934).

222. See *Lawrence v. Dana*, 15 F. Cas. 26, 61 (No. 8,136) (C.C.D. Mass. 1869). See also *New York Tribune v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D.N.Y. 1941). See also *COPYRIGHT LAW* 17 U.S.C. § 104 (1964) (damages).

223. See text following note 125 *supra*.

224. *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914).

225. See text following note 210 *supra*.

226. See text following note 163 *supra*.

227. *Leo Feist, Inc. v. Song Parodies, Inc.*, 146 F.2d 400 (2d Cir. 1944); *Bloom v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903).

228. *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40 (S.D.N.Y. 1941).

229. *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E.D. Wis. 1941).

230. *Sayers v. Spaeth*, *COPY. OFF. BULL.* (No. 20) 625 (S.D.N.Y. 1932).

The defendants in *Folsom v. Marsh*<sup>231</sup> had copied a substantial portion of the plaintiff's multi-volume work and Mr. Justice Story held them liable for violating the copyright.<sup>232</sup> Here the issues of quantity and quality tended to overlap. In sum, there can be no fair use if there is or likely will be substantial injury to the copyright owner by virtue of the use.

*The Amount of the User's Labor Involved.* Courts have a natural tendency to find against one who copies another's material verbatim. If this practice is found, the fact that there is an absence of injury to the copyright owner will not preclude a finding of infringement.

This factor is particularly significant when originality is lacking in the facts or materials of the copied version, and the facts or materials copied are open to all.<sup>233</sup> Thus, the compiler of an atlas or city directory may use earlier works on the subject if he adds his own revision and correction so as to produce his own original result and if he does not deny the use made of the preceding work.<sup>234</sup>

*The Benefit to the User.* The scope of the privilege of fair use is determined at least partially by the benefit derived by the user.<sup>235</sup> Generally this benefit will manifest itself in the amount of the user's labor involved.<sup>236</sup> Ball says that "no one is entitled to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit . . . ."<sup>237</sup>

*The Manner by which the Copying Was Accomplished.* It is obvious that a critical element is the manner of appropriation. The potential for harm to the copyright holder is slight when

231. 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

232. See Mr. Justice Story's often-quoted test at note 195 *supra*.

233. *Farmer v. Calvert Lithographing Co.*, 8 F. Cas. 1022 (No. 4,651) (C.C.E.D. Mich. 1872) (map). See also *Markham v. A. E. Borden Co.* 206 F.2d 199 (1st Cir. 1953) (catalogues); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943) (photograph); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937) (telephone book); *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1921) (trade mark directory); *Ager v. Peninsular & Oriental Steam Navigation Co.*, 26 Ch.D. 637 (1884) (telegraphic code).

234. See *White v. Bender*, 185 F. 921 (C.C.N.D.N.Y. 1911).

235. See, e.g., *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950); *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

236. See text following note 233 *supra*.

237. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 261 (1944).

the culprit is a pen, but when the copier resorts to a high speed photoduplicating machine the injury is imminent and beyond repair.

#### IV. APPROACHES TO PROTECTION

There is a problem caused by the ever increasing need for rapid and efficient dissemination of literary works. Copying has become a simple technique and copying machines have become common and familiar everywhere. Copies may be used for scholarly purposes as well as infringement. As the cost of copying continues to drop and new and better techniques are developed, a dilemma is posed: how to meet the user's needs for information and at the same time protect the copyright owner's property rights.

It is not easy to consider, measure and evaluate the various alternatives from the viewpoint of the interest groups involved when it is remembered that the producer (copyright owner) is also a consumer. But two points are clear. First, literary works are the property of the copyright owner. Second, the owners usually want this material copied—for a price.

Before considering possible courses of action it is important to list a number of basic values that should be included in any acceptable plan.<sup>238</sup> (1) The approach should allow a copy or copies to be made without first securing permission from the copyright owner, (2) the approach should furnish a reasonable compensation to the copyright owner to recognize both the lost sale and the property right, (3) the approach should treat all literary work uniformly, (4) the approach should be practical to administer, and (5) the approach should provide for mandatory participation of copyright owners and users.

We are now in a position to evaluate the various approaches.

##### A. *Legislative Alternatives.*

*Statutory Silence.* One possible solution is legislative inaction. This would require the courts to solve the problems associated with wide-spread copying devices. The issue of fair use is particularly susceptible to this case-by-case solution. I am not convinced for reasons that will be made clear in the next

238. A set of necessary and desirable specifications for nonprofit scientific or educational copying purposes has been outlined in *First Annual Report of the Committee to Investigate Copyright Problems Affecting Communication in Science and Education*, 10 BULL. COPY. SOC. 1 (1962).

section that any legislative approach can or should be expected to answer issues of relative value, user's intent, competitive effect and the like. The interest groups are quite prepared to leave these questions to the courts; their faith is good enough for me.

The music industry faced a similar, although not completely analogous, situation early in the 1900's. Faced with legislative inaction the American Society of Authors, Composers and Publishers has operated a clearing house successfully for over fifty years.<sup>239</sup>

I suggest that those who find fault with a legislature who would not face up to answering this problem may be missing the point entirely.<sup>240</sup> Our capitalistic system of free enterprise sagely leaves such economic matters to private decision in the marketplace. When the time is right and the needed number of dollar ballots have been counted, a freer bargain will be struck between buyer (user) and seller (copyright owner) than could emerge from the emotion charged political chambers of government.

This approach would be based on the premise that the failure to mention fair use in the first of the modern copyright revisions<sup>241</sup> in 1909 was intentional and wise. A Senate committee reported: "Questions . . . of what is a 'fair use' of copyrighted matter, and what is an 'infringement' it leaves still to the courts."<sup>242</sup> The best case for statutory silence might be stated as follows:

Arguably, the question of fair use, as merely one dimension of the problem of infringement, is as peculiarly susceptible to case-by-case solution as infringement itself. . . . No

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239. The organization and operation of ASCAP is detailed by Professors Kaplan and Brown, who have made a career studying the protection of literary, musical and artistic works. KAPLAN & BROWN, *CASES ON COPYRIGHT* 428 (1960). See also, Finkelstein, *Public Performance Rights in Music and Performance Rights Societies*, in *SEVEN COPYRIGHT PROBLEMS ANALYZED* 69 (1952).

240. *First Annual Report of the Committee to Investigate Copyright Problems Affecting Communication in Science and Education*, 10 BULL. COPY. SOC. 1 (1962).

241. Our first copyright law was enacted in 1790. General revisions have occurred in 1831, 1870 and 1909. The last statutes were compiled into 64 sections. Copyright Law, 17 U.S.C. §§ 1-215 (1964).

242. S. REP. No. 6187, 59th Cong., 2d Sess. (1907). The Librarian of Congress stated that fair use is not treated in the bill but left "to the courts to determine the meaning and extent." *Hearings on S. 6330 & H.R. 19853 Before the Committee on Patents*, 59th Cong., 1st Sess. 15 (1906).

statute can effectively cover questions of quantity, shadings of purposes and competitive effect and the like. To select narrow areas for solution might be inequitable unless there are special problems of practical significance to be resolved.<sup>243</sup>

*Statutory Fair Use.* There are at least four possibilities for treatment of the problem of fair use through legislation: (1) to recognize the doctrine of fair use without further elaboration or definition, (2) to recognize expressly the doctrine of fair use for certain purposes or specific situations, (3) to recognize expressly the doctrine of fair use by specifying criteria for determining whether a particular use is permissible, and (4) to recognize expressly the doctrine of fair use for certain purposes as long as specific conditions are met.

(1) *Recognition of the Doctrine of Fair Use Without More.* The 1965 Revision Bill simply stated that "the fair use of a copyrighted work is not an infringement of copyright."<sup>244</sup> This approach was adopted because "it appeared impossible to reach agreement on a general statement expressing the scope of the fair use doctrine, and since in any event the doctrine emerges from a body of judicial precedent and not from the statute."<sup>245</sup> The House Committee on the Judiciary believed that even this approach was meaningful and in the best interest.

The sharp dialogue at the hearings between the authors and the publishers and that between educators and scholars did not hide their unselfish appreciation of mutual goals and of the need for reasonable accommodation. The provision would maintain a degree of flexibility that would be lost if Congress attempted to define the doctrine. The needs of the interest groups could best be worked out voluntarily or left to litigation.

An interesting similar approach to the problem of fair use would have engrafted an exception to the general copyright grant of section 4 that "nothing in this Act shall prevent the fair use of quotations from copyrighted matter."<sup>246</sup> Under the

243. Latman, *Fair Use of Copyright Works, Study No. 14 in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE COMMITTEE ON THE JUDICIARY*, 86 Cong., 1st Sess. 32 (1958).

244. H.R. 4347 & S. 1006, 89th Cong., 1st Sess. (1965).

245. COPYRIGHT LAW REVISION, PART 6 SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 28 (1965).

246. H.R. 139 and S. 176, 72d Cong., 1st Sess. (1931).



provision fair use would be permissible only in the absence of an express prohibition by the copyright owner.

(2) *Recognition of the Doctrine of Fair Use for Certain Occasions*. A bill introduced to the sixty-eighth Congress in 1924 proposed immunity for fair use covering four broad categories:<sup>247</sup> (1) educational uses, including study and research, (2) special uses of a public nature, including criticisms or reviews and newspaper articles, (3) public performances of a published work, and (4) reproduction of artistic works. Had the Bill become law I suggest it would have created more problems than it resolved. No definition of fair use was offered. This is not only excusable, it is preferable. But, a number of vague and amorphous phrases such as "short passages,"<sup>248</sup> "reasonable extract,"<sup>249</sup> and "main design or scope"<sup>250</sup> were used. Judicial interpretation of this fair use provision would probably have caused a radical departure from the then existing case law on the subject.

Similarly, a Senate bill exempted from liability performance of a copyrighted musical work when used for charitable, religious or educational activities in addition to the "merely incidental and not reasonably avoidable"<sup>251</sup> use of copyrighted material in a motion picture or broadcast dealing with current news events. Another bill in the House of Representatives gave an exemption to a news photograph "as an item of public or general interest."<sup>252</sup>

In the hearings on these bills the interest groups split in expected fashion. ASCAP cried foul:

There is no reason why exhibitors and distributors of news-reels should be permitted to make profit from the use of copyrighted material without payment.

There is nothing to prevent an unscrupulous broadcaster from broadcasting an entire show as a current event. This could be done by merely coupling the performance with a broadcast of current news events.<sup>253</sup>

247. H.R. 8177, 68th Cong., 1st Sess. § 27 (1924). The British Copyright Act of 1911 served as the model. 1 and 2 Geo. 5, c. 46 § 2 (1911).

248. H.R. 8177, 68th Cong., 1st Sess. § 27(4) (1924).

249. *Id.* at § 27 (5).

250. *Id.* at § 27 (2).

251. S. 3047, 74th Cong., 1st Sess. § 17(g)(4) (1935).

252. H.R. 11420, 74th Cong., 2d Sess. § 26 (1936).

253. *Hearings Before the House Committee on Patents*, 74th Cong., 2d Sess. 122 (1936).

Of course the National Association of Broadcasters favored the bills, claiming that only a technical violation of the copyright with minimal damage at most was allowed. On what were termed "important considerations of public policy,"<sup>254</sup> the broadcasters called for the unrestricted continuation of "one of radio's greatest contributions to civilization."<sup>255</sup>

The movie producers, not surprisingly, found themselves siding with their perennial competitors, the radio broadcasters. They characterized this provision as a token gesture and urged the adoption of a proposal that would cover all copyrighted material where the infringement was "incidental and not really avoidable."<sup>256</sup>

The most complete and renowned study of copyright revision was carried out by the Shotwell Committee from 1938 to 1941.<sup>257</sup> The Shotwell provisions introduced by Senator Thomas took four different approaches to the issue of fair use and covered a number of controversial situations: (1) The bill gave permission for translation incident to private study and research as well as for reproductions of single copies by libraries of unpublished or unavailable works needed for study or research.<sup>258</sup> (2) The bill gave permission to radio and television broadcasters to record their programs for private file and reference purposes.<sup>259</sup> (3) The bill gave permission for incidental infringement either in the course of simultaneous news reporting from the location in question or in a photograph, motion picture or television broadcast of a work of art on public exhibition.<sup>260</sup> (4) The bill gave permission for public performance of musical compositions by charitable, religious or educational groups and representations of architectural works as long as they were not in the nature of models, designs or plans.<sup>261</sup>

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254. *Id.* at 478.

255. *Id.*

256. *Id.* at 1020.

257. The entire history of the committee and its efforts are contained in SHOTWELL PAPERS (1939-1941).

258. S. 3043, 76th Cong., 3d Sess. § 12(f), (g) & (h) (1940).

259. *Id.* at § 12(e).

260. *Id.* at § 12(b) & (d).

261. *Id.* at § 12(a) & (c).

These elaborate and varied provisions concerning fair use were the subject of considerable discussion, analysis and controversy.<sup>262</sup>

(3) *Recognition and Definition of the Doctrine of Fair Use.* The boldest attempts to cope with legislative recognition of fair use specified relevant factors or general criteria present in the common law as an aid to defining fair use or provided for controlling effect factors, for example, by specifying the permissible amounts of material that may be reproduced.

As shown above the courts have evolved a set of criteria to balance the equities when no statute exists. These criteria were reduced to four standards in the 1963 draft revision bill:<sup>263</sup>

(1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) effect of the use upon the potential value of the copyrighted work.

This legislative approach would present the practical difficulties faced by any attempt to codify the common law. A further problem is simply that subtle factual interactions vary from case to case. A court is best able to balance and apply the recognized criteria under a factual rather than statutory context. What may be more troublesome is that it would not be uncommon for gaps to be left by the statute.

Congress has within its power to enlarge as well as restrict the judicially constructed doctrine of fair use. This could be accomplished by specifying the relevant criteria. However, before Congress takes such a giant step they must be aware of the barrel of snakes such legislation unhappily poses.

The 1963 bill would have permitted libraries to supply a single photocopy of a portion of a copyrighted work or a single photocopy of an entire copyrighted work if it were out of print. This provision was finally dropped in the face of adverse comment. The authors and publishers argued that the law would permit uses that were currently considered illegal: The wholesale and unrestrained copying by libraries could re-

262. The subjects ranged from the special problems of the scholar to the appropriate limitations on performing rights. The pressure groups were well represented but they made for more discord than harmony. See Sargoy, *Comparison of the Drafted Proposals of the Various Interested Groups* in 1 SHOTWELL PAPERS 241 (1938-1939).

263. See COPYRIGHT LAW REVISION, PART 6 SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 26 (1965).

place publishers' editions and undercut their sales and revenues.<sup>264</sup> The library groups maintained that the provision would prevent practices that were then thought to be legal: The established services would be curtailed and the ability to use new devices in the interests of research and scholarship would be prevented.<sup>265</sup>

Although earlier attempts had used such phrases as "short passages"<sup>266</sup> and "reasonable extracts,"<sup>267</sup> either model contained its built-in defects. The 1963 approach was rigid and unyielding under any situation while the earlier draft offered no clue as to whether they were codifying the common law or framing a new, vague standard to be left for judicial interpretation.

(4) *Recognition of the Doctrine of Fair Use Under Certain Conditions.* Congress might attempt to cover specific fair uses with recognition given to generally accepted criteria or conditions. The 1964 bill<sup>268</sup> included substantially the same criteria seen in the 1963 version but focused its attention on purposes "such as criticism, comment, news reporting, teaching, scholarship, or research."<sup>269</sup> Thus, the 1964 bill shades over into the fourth category because the recognized uses and criteria come into play only "to the extent reasonably necessary or incidental to a legitimate purpose."<sup>270</sup>

In like fashion, several bills have recognized fair use only after fulfilling the condition precedent of acknowledgment. Thus, House bills<sup>271</sup> in the seventy-second Congress provided:

None of the remedies given to the copyright owner by this Act shall be deemed to apply to . . . the fair use of quotations from copyright matter provided credit is given to the copyright owner.<sup>272</sup>

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264. COPYRIGHT LAW REVISION, PART 6 SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 26 (1965).

265. *Id.*

266. H.R. 8177, § 27, 68th Cong., 1st Sess. (1924).

267. *Id.*

268. H.R. 11947 & S. 3008, 88th Cong., 1st Sess. (1964).

269. *Id.* at § 6.

270. *Id.*

271. H.R. 10364 & H.R. 10740, 72d Cong., 1st Sess. (1932).

272. *Id.* at § 11. A subsequent measure introduced the addition of the words "or the work quoted to" to the end of the subsection. H.R. 10976, § 11, 72d Cong., 1st Sess. (1932). The policy behind these bills was to fill the doctrinal gap left where use was not strictly forbidden. In truth the issues of acknowl-

There are three categories of fair use decisional law. The first covers the recognized purposes of criticism, review and scholarship.<sup>273</sup> The second includes news reporting, teaching and like practices.<sup>274</sup> In the third category are those uses courts cannot agree upon such as parody and burlesque, and personal use.<sup>275</sup> The first two categories were partially recognized by the 1964 bill. Yet the hard cases, those in the third category, perhaps most deserving of Congressional enlightenment, were ignored.

*Statutory Licensing.* Compulsory statutory licensing is recognized in the present law.<sup>276</sup> It is provided that when the copyright owner of a musical work has once permitted its use in a phonorecord, anyone else may use the work in another phonorecord upon notifying the copyright owner and paying a specified royalty. This principle could be extended to copyrighted literary works.

The compulsory licensing provisions were introduced in the Copyright Law as a compromise in 1909 in an attempt to balance rival philosophies.<sup>277</sup> The one side, fearing monopoly, favored nonrecognition of recording and mechanical reproduction rights,<sup>278</sup> while the other side, stressing the rights of artists

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edged credit or express prohibition represent rival philosophies, for by suffering one the other is diluted. Since this goes to the very heart of the copyright rationale, it is worth noting that the shooting still goes on. See H.R. 139, § 4 & S. 176 § 4, 72d Cong., 1st Sess. (1931); H.R. 8177, § 27, 68th Cong., 1st Sess. (1924).

273. See text following notes 99 & 125 *supra*.

274. See text following notes 182 *supra*.

275. See text following notes 157 & 163 *supra*.

276. Copyright Law, 17 U.S.C. §§ 1(3), & 101(e) (1965).

277. Except for the relocation of the semicolon in section 1(e) in 1947 to separate the provision relating to "public performance for profit" rights from the judicially construed provisions relating to recording and mechanical reproduction rights and the change of numbering section 25(e) to 101(e) the provisions have remained intact since 1909. See Act of July 30, 1947, 61 Stat. 652; *Hubbell v. Royal Pastime Amusement Co.*, 242 F. 1002 (S.D.N.Y. 1917). For a clause-by-clause analysis of the compulsory license provisions see Evans, *Law of Copyright and the Right of Mechanical Reproduction of Musical Compositions*, COPYRIGHT LAW SYMPOSIUM 113, 118-31 (1940). The pre-1909 controversy is documented by Henn, *The Compulsory License Provisions of the U.S. Copyright Law*, Study No. 5 in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE SUBCOMMITTEE ON THE JUDICIARY, 86th Cong. 1st Sess. 2-12 (1956).

278. A potential monopoly on mechanical music through the use of exclusive contracts was regarded as a serious threat at a time when effective antitrust regulation was still in its infancy. See H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7-8 (1909). *Hearings on H.R. 19853 & S. 6330*, 59th Cong., 1st Sess. 23-26, 94-97, 139-48, 166, 185-98, 202-06 (1909).

and freedom of contract, urged absolute recognition.<sup>279</sup> The end result was qualified recognition based upon the compulsory license principle.

For almost 60 years the American record industry has relied on the compulsory license principle. This has had a profound effect upon the music business and many of the present practices in the industry are directly related to the provision. Specifically, the provision places four limitations on the copyright owner's freedom to contract: (1) the persons with whom he may refuse to contract, (2) the times when he may contract, (3) the price at which he may contract, and (4) the time period during which the copyrighted property may be used. Just as soon as one recording has been agreed to, anyone is free to record the same composition without time limit so long as he makes the required royalty payments.

It should be borne in mind that exercise of the compulsory license is entirely optional with the record maker, being compulsory only on the copyright owner. The alternative of bargaining with the copyright owner for a negotiated license is always open to the record maker. Consequently, the statutory royalty rate operates as a ceiling: The record producer can bargain for a lower rate, but the copyright owner can never bargain for a higher one. The vast majority of recording licenses in the United States have been negotiated, and at various times in the past, record manufacturers have obtained negotiated licenses at less than the existing statutory rate.

Should the principle of the compulsory license for mechanical recording of music be transferred over to the field of literary works? The major issues of such an approach include the following: (1) the specified event, such as publication or permission given to anyone to copy, that will make the compulsory license available, (2) the nature of the original literature that will or will not make the copyrighted work available to others for copying under a compulsory license, (3) the nature of the copies that can or cannot be made under a compulsory license, (4) the limitations on the right of copying incidental to using under a compulsory license, (5) the requisite notice to be given to the copyright owner of the user's intention to exercise the compulsory license, (6) the liability and/or termination of the compulsory license to the copyright owner if a user fails to give

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279. See 37 MUSIC TRADES, March 13, 1909, at 6.

the required notice, (7) the identification of the copyright owner in the registration or other public records of the Copyright Office, (8) the effect of the copyright owner's failure to file identification in a suit for infringement of copyright, (9) the basis of the royalty either on the number of copies made or on the number of distributed, (10) the rate of the royalty which may be a flat sum per copy, a flat sum per page or per unit of material, a percentage of the retail sales price or a percentage of the manufacturer's price, (11) the amount of the royalty to be paid whether a flat sum or percentage figure, (12) the accounting and payment practices of users of the compulsory license to safeguard the copyright owner, (13) the mechanism for collecting the royalties and distributing them, and (14) the application of the royalty rate to literary works manufactured in the United States, to literary works sold in the United States or some other basis.

There may be several possible variations on each of these major aspects of a compulsory license provision for literary material. For example, the freedom to copy might become effective only after a certain time period, or the statutory royalty might be varied in numerous ways. Moreover, the compulsory concept itself might be limited to a fixed period after a specified event such as the permission given to anyone to copy. In addition, a tribunal might be established to determine a fair or reasonable royalty. Still other variations might be applied, such as a sliding scale of royalties increasing as the number of sales of the work increased.

Each of the points would present a lively issue. The law would permit copying, thus, instilling a degree of certainty. Copyright owners would receive a fee for their labors. And users of copyrighted material would not be free to appropriate—trespass on—what should be regarded as the most private of all property rights.

Paradoxically, this arrangement would reduce the owner's property rights at the same time, for he would not be able to choose who may copy. Yet, since the practice is so widespread already, this is a realistic recognition of the fact of commercial life.

*B. Private Ordering Alternatives.**Voluntary Agreement Among Users and Copyright Holders.*

The Gentlemen's Agreement<sup>280</sup> entered into between the Joint Committee on Materials for Research of the American Council of Learned Societies, the Social Science Research Council, and the National Association of Book Publishers in May 1935 was the first uniform policy concerning copying by libraries.

In substance the agreement provided<sup>281</sup> that libraries and similar institutions might make single copies of a "part" of a book or periodical to be furnished "without profit" to a scholar who represented in writing that the copy was in place of a loan or in lieu of a hand copy and was solely for purposes of research. The agreement not only purported to exempt from liability the library reproducing the copy, but also its agents. The scholar receiving the copy was warned of his liability to the copyright owner should he misuse the copy.

The agreement recognized the exclusive right of the copyright owner to make copies of his work notwithstanding the doctrine of fair use. No working definition of fair use was contained in the agreement. However, the portions quoted below are of interest:

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest.

The statutes make no specific provision for the right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from

280. The complete text of this agreement was published in 2 JOURNAL OF DOCUMENTARY REPRODUCTION 31 (1939); the principal portion of it reappeared in 46 LAW LIB. J. 10 (1953).

281. The agreement is no longer of legal effect.

One of the parties to the so-called agreement, the National Association of Book Publishers, has since ceased to exist. The book publishers are now organized in the American Book Publishers Council. Furthermore, the periodical publishers, who publish most of the scientific and technical material of interest to researchers, were not generally members of that Association, and even many book publishers were not members.

Varmer, *Photoduplication of Copyrighted Materials by Libraries*, Study No. 15 in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE SUBCOMMITTEE ON THE JUDICIARY, 86th Cong., 1st Sess. 49, 51 n. 9 (1959).



copyrighted material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.<sup>282</sup>

A letter from Robert C. Binkley, Chairman, Joint Committee on Materials for Research, follows in part:

The agreement was not made as a contract conferring rights and imposing obligations on the parties, but was rather a statement of the practical scope of the established doctrine of fair use as applied to the making of photostat or other copies by libraries for scholars. The practice is old, has been recognized as reasonable and has never led to any litigation. The Courts have, in other cases, long recognized that copyrights are subject to fair use.<sup>283</sup>

The Gentlemen's Agreement was only the first step in placing the reproduction of copyrighted materials on a firm legal basis. Disclaimers from liability came into practice.<sup>284</sup>

A statement of policy with regard to the reproduction of library materials was prepared by Keyes D. Metcalf, Executive Secretary of the Association of Research Libraries, at the request of the Association and adopted by the Council of the American Library Association, at its midwinter meeting in December 1940. This became known as the Reproduction of Materials Code.<sup>285</sup>

The Gentlemen's Agreement was limited to "books and periodical volumes." The Code, however, covered three categories of

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282. Materials cited in note 280 *supra*.

283. 2 JOURNAL OF DOCUMENTARY REPRODUCTION 35 (1939).

284. Below is a typical disclaimer drawn by legal counsel:

I represent that this order for a photocopy of each of the materials listed above is in lieu of any loan or manual for my private use for research purposes, *I understand that I cannot legally sell or further reproduce the copy supplied without the express permission of the copyright proprietor if publication is covered by copyright.* I assume responsibility for copyright infringement arising out of this order or the use of materials requested and I will hold the [copying institution] harmless from any misuse of such material.

Note that the disclaimer attempts to do four things:

(1) The reader states that it is in lieu of a loan or manual transcription by the patron, to which some add that they are not selling the copy but charging for a service. (2) The reader certifies that it is solely for his service use for scholarship research. (3) The reader certifies that he will make no unauthorized use of it. (4) The reader states that he assumes responsibility for copyright infringement and will hold the library harmless in any infringement actions.

The first three provisions had an eye on the Gentleman's Agreement.

285. The full text of the Code was published in 35 A.L.A. BULL. 84 (1941).

works: non-copyrighted material, copyrighted material, and manuscripts. Borge Varmer refers to the Code as mainly a "restatement of the rules of the 'Gentlemen's Agreement'" but concedes "additional rules of caution are incorporated."<sup>286</sup>

The Code recognized that there were no legal restrictions on the reproduction of materials in the public domain. But in the case of works still in print the recommended policy, for ethical reasons, was

that before reproducing uncopyrighted material less than 20 years old, either for sale or for use within the library, libraries should ascertain whether or not the publication is still in print and if it is in print should refrain from reproducing whole numbers or volumes or series of volumes.

This recommendation did not apply to individual articles or extracts reproduced without profit.

In the case of copyrighted out-of-print materials, mention was made of the application of the "practical and customary meaning of 'fair use' . . . for research purposes." The recommended policy was that, "in all cases which do not clearly come within the scope of the agreement, either the scholar requiring the reproduction or the library to which the request is made should seek the permission of the copyright owner before reproducing copyrighted material." The parties should practice special care "in the case of illustrations or articles that are covered by a special copyright." In regard to copyrighted in-print materials, the statement read:

Legally there is no distinction between in-print and out-of-print copyright material. Reproduction of in-print material, however, is more likely to bring financial harm to the owner of the copyright, and it is recommended that libraries be even more careful than in the case of out-of-print material.

The policy relating to unpublished works and manuscripts not subject to statutory copyright but to literary common law rights<sup>287</sup> was that "reproduction may probably be made to as-

286. Varmer, *Photoduplication of Copyright Materials by Libraries*, Study No. 15, in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE SUBCOMMITTEE ON THE JUDICIARY, 86th Cong., 1st Sess. 49, 52 (1959).

287. Copyright Law, 17 U.S.C. § 2 (1959). The Yale Law School inserts the following caveat in the library copy of a manuscript LL.M. or J.S.D. thesis:

The material in this volume is not "published", and since it is the personal property of the author, it must not be copied without his permission. As an added precaution theses are kept under lock and key in the closed stacks.

sist genuine scholarly research if no publication is involved." Care was to be exercised to observe all restrictions stipulated by the donor. Reproduction was to be permitted only when it was clearly shown that it was authorized.

In the General Inter-library Loan Code of 1952,<sup>288</sup> the following two paragraphs, based on the Gentlemen's Agreement,<sup>289</sup> appear:

Photographic duplication in lieu of interlibrary loan may be complicated by interpretations of copyright restrictions, particularly in regard to photographing whole issues of periodicals or books with current copyrights, or in making multiple copies of a publication.

Any request, therefore, that indicates acceptability of a photographic substitution, under the conditions described above, should be accompanied by a statement with the signature of the applicant attesting to his responsibility for observing copyright provisions in his use of the photographic copy.

The photocopying problem is still receiving attention. The Joint Libraries Committee on Fair Use in Photocopying<sup>290</sup> undertook, in 1959, a study of library reproduction practices and the nature of research demand. In March, 1961, the Committee concluded: (1) The making of a single copy by a library is a direct and natural extension of traditional library services. (2) Such service, employing modern copying methods, has become essential. (3) The present demand can be satisfied without inflicting measurable damage on publisher and copyright owners. (4) Improved copying processes will not materially affect the demand for single-copy library duplication for research purposes.

The Joint Libraries Committee, therefore, recommended "that it be library policy to fill an order for a single photocopy of any published work or part thereof." As one of its many conclusions drawn from the study of library practice and research demand, the Committee stated: "It is clear from the Committee's studies that the various codes and agreements heretofore proposed or adopted do not affect or reflect actual practice."

288. 13 COLLEGE AND RESEARCH LIBRARIES 350 (1952).

289. See Uridge, *The General Interlibrary Loan Code 1952: An Explanation*, 46 LAW LIBRARY J. 7 (1953).

290. Joint Libraries Committee on Fair Use in Photocopying. 1961. *Fair Use in Photocopying: Report on Single Copies*. 55 A.L.A. BULL. 572 (1961).

In sum, there was much ink spilled over nothing. A critical appraisal of these approaches points out many of the shortcomings. (1) The legal effect is less than perfect insulation from a copyright infringement suit because all copyright owners will not be party to the agreement. (2) The problem of large-scale multiple copying is not solved. (3) The agreement does not contribute to the support of the copyright owner.<sup>291</sup> (4) The claim that no part of a copyrighted work might be copied by any means without the written permission of the copyright owner does not square with actual practice as recognized by the courts. (5) The exemption from liability extended no real protection to a librarian in any particular case, especially one involving a publisher not a member of the group with whom the agreement was reached. (6) The agreement may imply an admission of wrong-doing. (7) The application of the exemption is limited by allowing copying only in lieu of loan, solely for purposes of research. (8) The agreement would not allow copying of out-of-print material.

For all these reasons the search for a more acceptable basis for photocopying must not cease.

*Agreement on a Contractual Basis for Payment of Royalties.*

A possible private approach between copyright holders and groups of users would be to allow contractually a number of multiple copies in consideration for payment of royalties. In truth this is but one step beyond the Gentlemen's Agreements.

On the asset side publishers and authors would receive royalties, multiple copying would be permitted, and accounting and administrative details would be settled in advance. On the liability side are many of the same debits seen pertaining to the voluntary agreements. Also this arrangement might tend to be exclusive and selective; it would not be subscribed to by all parties. With the threat of infringement suits and ill-will hanging over the scene, it is plain that this is more a primrose path than a bed of roses.

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291. The Committee studying the General Inter-library Loan Code of 1952 considered a proposal to instate a fee but decided that means to cut the costs of service should be explored before sanctioning fees. For possibility of charging such fees, see General Inter-library Loan Code 1952 § 6. See also *Minutes of the Association of Research Libraries*, 12 COLLEGE AND RESEARCH LIBRARIES 282 (1951); 13 COLLEGE AND RESEARCH LIBRARIES 55 (1952); *Fees for Research Library Use by "Outsiders": A Symposium*, 13 COLLEGE AND RESEARCH LIBRARIES 295 (1952).

*Clearing House Arrangement.* A clearing house<sup>292</sup> arrangement could be worked out under one of three possible approaches: (1) the statutory approach, (2) the statutory approach with a private clearing house, and (3) the private approach. The statutory approach would be the same as the statutory licensing approach described above. The administration—including setting, collecting and distributing the fees—would be a part of the public plan. A slight variation would be to enact the same licensing system but leave the clearing house details to be devised by the private parties. This is reminiscent of the successful ASCAP approach and much could be said in its favor. A completely private approach would require working out all the major details of the statutory licensing arrangement and then some.

Since the private approach is more flexible and in tune with our free enterprise heritage, it is well to consider its merits. One proposal worth mention is that endorsed by the Author's League of America, Inc.<sup>293</sup> The main structure of this system is described below:

*Clearinghouse:* All authors and publishers using the system would operate under one clearinghouse, through which all royalties would be paid.

*Permission:* No advance permission would be required to make copies of works covered by the system. Users need only pay the specified royalty and comply with the license conditions.

*Royalty Rates:* Royalties would be paid on a cents per page/per copy basis, depending on the type of work copied—e.g., prose, poetry, periodical article. Lower rates would be fixed for nonprofit, educational institutions.

A rate schedule applicable for one year, would be published annually by the clearinghouse and furnished to libraries, schools, industrial concerns, and other library users. The schedule would be posted on copying machines.

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292. On the matter of a clearing house see generally, *First Annual Report of the Committee to Investigate Copyright Problems Affecting Communication in Science and Education*, reprinted in 10 BULL. COPYRIGHT SOCIETY OF THE U.S.A. 1 (1962), REPROGRAPHY AND COPYRIGHT LAW 189 (Hattery & Bush ed. 1964).

293. Authors League of America, Inc., *A Licensing System*, 91 LIB. J. 892-93 (1966).

*Payment by Stamp:* Royalties would be paid by means of copyright stamps sold through the clearinghouse, post offices and agent-banks. Stamps could also be fixed by vending machines. Stamp vending machines could be attached to coin-operated copying machines.

*Payment Procedure:* When copies are made, the person making them would affix copyright stamps in the amount of the royalty on a remittance card. The Library of Congress catalog card number may be required; for periodicals the title would suffice.

*Remittance of Cards:* Cards would be sent to the central clearinghouse at a single address. They would be accumulated at the point of copying and mailed bi-weekly or monthly.

*Disbursement of Payments:* The clearinghouse would distribute the cards for each work to its publisher. The publisher would credit the author, collect the royalties by redeeming the cards, and pay the author his share of all royalties collected on all of his works on a semiannual or annual basis.

*Identification of "Licensed" Works:* The simplest method of identifying works covered by the system would be to publish the fact on the title page of the work.

*Conditions:* Conditions as to the number of copies that could be made of certain types of works, and the limitation on their distribution, would be published in the Rate Schedule.

*Special Circumstances:* Where special circumstances require a publisher to fix higher rates or special conditions, for a particular work for a limited time after publication, this would be done by a notice on the title page.

*Cost of Operation:* The expenses of operating the licensing system would be met from the royalty income and collected by a discount applied against remittance stamps when they are redeemed by the clearinghouse.

*Policing:* Substantial compliance could be encouraged without vigorous policing procedures.

The Author's League clearinghouse system would cause troubles greater than those it could solve. We're better off with no licensing arrangement at all. Still this is a genuine attempt

to deal with the troublesome business of copying which is caught between the penumbra of fair use and infringement. The Author's League raises the right questions; it is only that the answers are unsatisfactory.

One critic took the proposal to task:

I see no reason why a pilot, when he is overflying my little territory, should not stick a few stamps on a 4" by 6" card (ten seconds) and fill out my grid coordinates on the front (20 to 60 seconds) and drop the card out of his window or bomb bay or whatever planes have (three to ten seconds, depending on the orifice). If my neighbor three miles downwind delivered them, I could then cash them in at the CAA or USAF after I had accumulated, say, a quarter's worth. It is widely known that sometimes pilots have to fiddle about with their instruments and so on and cannot always give these overflight stamps the attention they deserve. Librarians, too, will be occasionally called away from policing royalty stamps by other business, whatever it is that librarians do back there. Yet all these matters can be ironed out in time (X seconds), and readers, librarians, pilots, and probably other sneaky and impalpable violators, can be brought into a peaceable kingdom of voluntary, "inherently honest" stamp-lickers.<sup>294</sup>

Mr. Weatherford's comments, too, are inane but the implications are not impalpable. I will postpone discussing a more feasible approach now, since we are interested only in a general survey of public and private approaches to this question.

Another private approach took shape under the Committee to Investigate Copyright Problems:

The CHC [Copyright Clearing House] acts as a switching device, passing rights to make copies to all CS [Copying Services] subscribers in the CHC system. In both cases participation is voluntary, and regulated by some standard contract. The payments by the set of CS exceed the payments to the set of publishers by some agreed amount, which amount maintains the switching action. The result is presumably an increase in numbers of copies and increased communication in science, education, and other fields; and an increase in revenue of publishers. Since the revenue is

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294. Weatherford, *On the Grindstone*, 91 *Lit. J.* 2784 (1966).

largely (but not exclusively) in addition to what the publishers receive for their publications, it is presumably a means of increasing *both* communication among users of the publications and revenue to publishers of the publications. Properly designed, the CHC should act as a switch which supports science by increasing the return on the intellectual property which the messages represent.<sup>295</sup>

This method of solving the copyright duplication problem has three virtues. It maintains the copyright principle and sustains that part of the creativity cycle dependent upon copyright. It offers an economic switching device, a means for copiers to pay a modest fee for the privilege of copying, and enables them to copy by means of the new techniques—that is, easily, cheaply, rapidly, and lawfully in unlimited amounts. It is readily extendible to other media.

There is something to be said against this solution. The worst feature is its dependence on the voluntary cooperation of publishers and copiers. A voluntary system leaves too great an abuse gap. Since it would be voluntary, participation would be less than complete. Too, it runs the risk of being too expensive to operate and so would not be self-sustaining; thus, its days would be numbered. Finally, this proposal would obviate the need for the fair use principle in photocopying. A more satisfactory solution would leave the fair use doctrine viable.

*Ad Hoc Approaches.* Several alternatives could be devised by the interest groups to buy or sell copies. Publishers could furnish copies or reprints as needed, or big users of literary material such as libraries or corporations could negotiate requirements contracts or individual licenses. These examples shade easily into the contractual approaches based on the Gentlemen's Agreement and, thus, share the same inherent disadvantages.

### *C. Program for General Revision of the Copyright Law.*

The present copyright law is basically the same as the comprehensive revision act of 1909.<sup>296</sup> Since that day advances in technology and enterprise have generated new industries and new methods for the reproduction, proliferation and dissemination of copyrighted works. Thus, it is no longer true that there

295. Heilprin, *Working Paper on the Feasibility of a Copyright Clearinghouse* (Committee to Investigate Copyright).

296. Act of March 4, 1909 Pub. L. 349, (March 4, 1909).



is a clear line between the makers and the users: Authors and readers are both simultaneously producers and consumers of the written word.

Between 1909 and 1946 a number of bills to amend particular provisions of the law were introduced,<sup>297</sup> and nine amendments were enacted.<sup>298</sup> None of these bills involved any broad revision of the law. After it became clear that the United States would not adhere to the International Copyright Convention, commonly known as the Berne Convention, to which most of the European countries and a number of important countries in other parts of the world were parties,<sup>299</sup> a new effort was directed toward a new international convention to which both the member countries and nonmembers of the union would join. On December 6, 1954, President Eisenhower deposited with UNESCO the instrument<sup>300</sup> ratifying the Universal Copyright Convention. Since then six acts<sup>301</sup> have been passed amending individual provisions of the copyright law, some of considerable substantive importance.

In 1955 the first phase of a three-phase program for general revision of the copyright laws commenced. The research and study phase culminated in 1961 when the House Committee on the Judiciary submitted to Congress the Report of the Register of Copyrights on the General Revision of the United States Copyright Law.<sup>302</sup> The drafting phase, devoted largely to discussion and debate, lasted for three years. On July 20, 1964 Chairman Celler introduced a revision bill<sup>303</sup> in both Houses of the 88th Congress for purposes of further consideration and debate. The Copyright Office made a partial revision of this 1964 bill taking account of the comments and suggestions it had

297. The most important are considered in their historical perspective in Goldman, *The History of the U.S.A. Copyright Law Revision from 1901 to 1954*, Study No. 1 in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE SUBCOMMITTEE ON THE JUDICIARY, 86th Cong., 1st Sess. 1, 4-12 (1955).

298. Act of Aug. 24, 1912, ch. 356; 37 Stat. 488; Act of Mar. 2, 1913, ch. 97, 37 Stat. 724; Act of Mar. 28, 1914, ch. 47, 38 Stat. 311; Act of Dec. 18, 1919, ch. 11, 41 Stat. 369; Act of July 3, 1926, 44 Stat. 818; Act of May 23, 1928, 45 Stat. 713; Act of July 31, 1939, 53 Stat. 1142; Act of Mar. 15, 1940, 54 Stat. 51; and Act of Sept. 25, 1941, 55 Stat. 732.

299. Ex. REP. No. 5, 83d Cong., June 11, 1954.

300. H.R. 6616, 83d Cong., 2d Sess. (1954).

301. Act of April 27, 1948, 62 Stat. 202; Act of June 3, 1949, 63 Stat. 153; Act of Oct. 31, 1951, 65 Stat. 710; Act of July 17, 1952, 66 Stat. 752, Act of April 3, 1954, 68 Stat. 52.

302. 87th Cong., 1st Sess. (1961).

303. H.R. 11947, 88th Cong., 2d Sess. (1964).

received. The third or legislative phase of the general revision began on February 4, 1965, when Senator McClellan and Representative Celler introduced House Bill Number 4347 and Senate Bill Number 1006 for congressional consideration. This bill was referred to a subcommittee<sup>304</sup> for hearings on the legislation. After an executive study of the measure it was recommended for passage as amended, October 12, 1966.<sup>305</sup> The bill's scope and goal may be briefly stated:

The bill now reported reflects the intricate network of relationships among the many groups and industries dependent for their existence upon works created by authors, and represents an effort to reconcile conflicting interests as fairly and constructively as possible. Despite the complexity and particularization of some of its provisions, however, the basic aim of the bill is very simple: to insure that authors receive the encouragement they need to create and the remuneration they fairly deserve for their creations.<sup>306</sup>

The dualism of stimulation and reward shines through this legislation with pristine clarity. With this as the background let us examine the fair use provisions relevant to this paper.

*The Recommended Bill's Treatment of Fair Use.* Amended section 107 is highly important for two reasons. It not only mentions the doctrine but also attempts to provide some gauge for balancing the equities.

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

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304. Hearings were held on the measure for 22 days. More than 150 witnesses were heard. The result was an illuminating 3-part, nearly 2000 page, report of the points and arguments raised by the witness. *Hearings on H.R. 4347, H.R. 5680, H.R. 6831 & H.R. 6835 Before Subcomm. No. 3 of the House on the Judiciary, 89th Cong., 1st Sess., pts. 1, 2, & 3 (1965).*

305. H.R. REP. No. 2237, 89th Cong., 2d Sess. (1966).

306. *Id.* at 32.

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>307</sup>

This language is substantially the same as that in the 1964 bill.<sup>308</sup> The author-publisher contingent strongly opposed the measure as too broad<sup>309</sup> while the research-education band assaulted the language as unduly restrictive.<sup>310</sup> With such unanimous opposition, chances for passage were slight. Witness the trimming it got by the 89th Congress; it was reduced in House Bill 4347 and Senate Bill 1006 to the frail statement that "the fair use of a copyrighted work is not an infringement of copyright."<sup>311</sup> This approach was supported on a broad front for the reason "that the doctrine should remain as flexible as possible, and that any attempt at definition could freeze the concept and open the door to massive, unreasonable abuses."<sup>312</sup> The educational and related interest groups weakly opposed the measure on the grounds that it was "vague and nebulous."<sup>313</sup>

How did a beefed-up 1964 version rise victorious? The explanation given in the report<sup>314</sup> accompanying the recommended bill is cavalier and assumes that the Committee can better judge what the critics of the 1964 bill subjectively meant despite what they objectively said. Section 107 was revised by the Committee without further discussion and debate. Since this is purportedly the last word before formal Congressional consideration, an observer would expect the final provision to represent either the fairest compromise or the most widely accepted bill to date. But the Committee proved itself regressive and in its own words,

intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. However,

307. *Id.* at 194; H.R. 2512, 90th Cong., 1st Sess. § 107 (1967).

308. H.R. 11947, H.R. 12354, & S. 3008, 88th Cong., 2d Sess. (1964).

309. COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 27 (1965).

310. *Id.*

311. H.R. 4347 & S. 1006, 89th Cong., 1st Sess. (1965).

312. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 59 (1966).

313. *Id.*

314. *Id.* at 61.

since this section will represent the first statutory recognition of the doctrine in our copyright law, some explanation of the considerations behind the language used behind the list of four criteria is advisable.<sup>315</sup>

Later in its report the Committee discussed the considerations,<sup>316</sup> and in so doing they assumed that the critics were wrong and that the recommended bill listing the four standards was neither too broad nor too restrictive on its face. By spelling out what should be left to judicial interpretation, the Committee opted to assure the critics that they were now correct even if they had been wrong before.

The Committee emphasizes that its statements with respect to each of the criteria of fair use are necessarily subject to qualifications, because they must be applied in combination with the circumstances pertaining to other criteria, and because new conditions arising in the future may alter the balance of equities. It is also important to emphasize that, by singling out some instances to discuss in the context of fair use, we do not intend to indicate that other activities would or would not be beyond fair use.<sup>317</sup>

This means that "other criteria" and "new conditions" are to be considered only after "fair use" has been determined.

The 1966 bill suggests there are only six fair uses: criticism, comment, news reporting, teaching, scholarship and research. Curiously enough it establishes these threshold requirements without offering a means of determining when the test is met. However, once a court has determined that a statutorily approved fair use presents itself, the trier must apply the four standards. In effect the court is precluded from taking and applying these as well as other factors to an asserted fair use. Also a court may never reach this limited four-standard analysis should it determine that a non-recognized use, say parody, is before the court. Or do parody and other judicially accepted uses fall within the six mentioned uses?<sup>318</sup>

315. *Id.*

316. *Id.* at 62-66.

317. *Id.* at 61.

318. *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964) held a parody to be fair use because it did not fulfill the demand for the original work and did not appropriate a greater amount of the original work than was necessary to recall or conjure up the object of the performance.

Criticizing the both too broad and too narrow 1964 measure, one attorney had this to say:

It should be remembered that the doctrine of fair use derives its vitality from its adaptability to conditions not only as they exist today but to new conditions which result from technological and other developments. Stated generally, the rule may make a definition between a true scholar and a chisler who infringes a work for personal profit. It can distinguish between a mere quotation and the theft of an essential portion of a literary work, and can differentiate between the infringer who seeks to reap where he has not sown and the scholar who is motivated solely by the desire to add to the common reservoir of ideas and information. Any attempt to confine the doctrine in a straitjacket by enumeration would destroy its vitality and its ability to accommodate itself to all conditions and to those as yet unforeseen.<sup>319</sup>

The distinction between fair use and copyright infringement cannot be determined by resort to any fixed rules or criteria. In each instance the result must depend upon a variety of factors, sometimes more, sometimes less than four.

The relevance of these various criteria rests upon the not-to-be-overlooked fact that not all books serve the same function or enjoy the same market. What may constitute fair use when factual material is taken from a reference book may well constitute infringement if fictional material were lifted from a novel. The greater liberality in permitting the use of material from reference works and scholarly publications represents a public policy developed by the courts in seeking to reconcile the exclusive rights of a copyright owner with the requirements of an overriding public interest.<sup>320</sup>

Heretofore, the courts have applied and developed fair use in the absence of statutory provision. The written provision in the 1966 amended version is inflexible. In determining whether there is a fair use in any particular case, the courts are guided by the exigencies of each situation. Because of the kaleidoscopic fact patterns, four rigid rules cannot be applied to all situations.

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319. *Hearings on H.R. 4347*, *supra* note 304, at 1706.

320. *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938).

## V. A PROPOSED SOLUTION

Before going into a proposal it would be wise to set forth the positions of the interested parties. A solution should satisfy all legitimate needs and requirements for the use of copyrighted material in all appropriate areas and by means of all appropriate devices.

### A. *The Interests at Stake.*

I have tried to indicate that due to the revolution taking place in the copying machine industry a curious paradox has presented itself. Never before have the consumers and the producers of literature become so merged. There may be consuming-producers or producing-consumers, but they are constantly shifting, and doing so at the same time. But instead of their pressure points of interest becoming homogeneous in this process, the producers, forgetting they have been consumers, clamor for one thing while the consumers remain aloof and demand another.

What I have tried to suggest is that because of this transition it may not be realistic to put the copyright office, authors, publishers, booksellers, copy equipment manufacturers, librarians, teachers, businessmen and so on to separate tests. Even assuming *arguendo* that no change has taken place, it is legally deceptive to sever the thread of common interest in the scientific and intellectual progress that joins all these interest groups. To give this question complete airing let us examine some of the positions they have taken. This should expose the policy and value bedrock upon which a satisfactory alternative must finally stand or fall.

*Congress and the Copyright Office.* The public interest is represented by the Congress and the Copyright Office. The Copyright Office like all branches of government may exercise one of three functions: it frustrates, it approves or it does something by doing neither.<sup>321</sup> This body is not a passive participant as some have claimed.<sup>322</sup>

During the hearings in 1965 the Register of Copyrights, Abraham T. Kaminstein, made the following remarks<sup>323</sup> con-

321. Professor Bickel's central contention in *THE LEAST DANGEROUS BRANCH* 200 (1962) is that a court checks, legitimates, or it does neither. Cf. *RODELL, NINE MEN* (1955).

322. See *REPROGRAPHY AND COPYRIGHT LAW* 141 (Hattery & Bush ed. 1964).

323. *Hearings on H.R. 4347*, *supra* note 304, pt. 3, at 1857-73.

cerning the fair use provisions of the 1965 bill.<sup>324</sup> Since this version was not Congress' last word the Register's three main points are all the more instructive.<sup>325</sup>

1. Anything that can be done under the doctrine of fair use now could be done under the bill . . . .
2. The doctrine of fair use, as the courts have evolved it, depends on a number of variable factors, including but by no means confined to the commercial character of the use and the effect on the author's potential market.
3. While the present law contains a "for profit" limitation with respect to the rights of public performance, the right of copying is an absolute right, unqualified by any "for profit" limitation. Any non-profit copying under the present law would clearly constitute infringement unless the doctrine of fair use were applicable. The bill does not change this situation in any way.<sup>326</sup>

Since the Register is clearly correct in stating that the doctrine of fair use is left at common law to the courts, how could the Committee on the Judiciary in the next session believe that they had not frozen the doctrine in the statute by expanding the statement of fair use in amended section 107?<sup>327</sup> The result cannot be the same when the two statutory models are incompatible.<sup>328</sup>

In the 1961 Report of the Register it was recommended that the new "statute should include a provision affirming and indicating the scope of the principle that fair use does not infringe the copy owner's rights."<sup>329</sup> By "scope" of fair use it may be inferred that the Register was referring to the eight categories that were illustrated by example in the report.<sup>330</sup> The kinds of uses that were specifically mentioned were review or criticism, scholarly or technical works, news reports, teaching, legislative or judicial use, incidental or fortuitous copying,

324. H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 & S. 1006, 89th Cong., 1st Sess. (1965).

325. See text at notes 244 & 307 *supra*.

326. *Hearings on H.R. 4347, supra* note 304, pt. 3, at 1359-60.

327. H.R. REP. No. 2237, 89th Cong., 2d Sess. 5 (1966).

328. A comparative table of Copyright Revision Bills would be helpful.

329. COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U. S. COPYRIGHT LAW, 87 Cong., 1st Sess., 25 (1961).

330. *Id.* at 24.

library reproduction and parody.<sup>331</sup> The latter four types of use were not mentioned in the 1966 bill.<sup>332</sup> Nor did the report recommend the inclusion of the relevant factors.<sup>333</sup>

Despite this apparent slippage from one bill and report to the next,<sup>334</sup> there should be no gap between the underlying ultimate aim of copyright legislation as set forth in the Constitution and any proposed revision bill. The policy is to foster the growth of learning and culture for the public interest. A fuller statement was made in the report on the 1909 Act:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.<sup>335</sup>

331. *Id.*

332. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 5 (1966).

333. COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 25 (1961).

334. See text beginning at note 307.

335. H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909).



So much for the vague and general public interest as represented by and seen through the eyes of Congress and the Copyright Office.

*Copyright Owners.* Authors, publishers and copyright owners whose livelihood depends totally or partially upon the sale of the literary work, stand for the property right and the commercial interest in copyright. Practically speaking, they could be expected to fight any revision bill that could destroy this market by allowing the untrammelled use of copying devices without insuring a fair compensation for that use.

The exclusive rights of a copyright owner now specified in section one of the copyright law are: (1) the right to make and to publish copies, (2) the right to make new versions, (3) the right of public performance, and (4) the right to make records. These rights have been subjected to certain limitations and exceptions, including fair use.

The proposed provision for giving the copyright owner exclusive rights appears in section 106 of the new bill:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyright work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, to display the copyrighted work publicly.

This section follows all of the recommendations of the 1961 Report,<sup>337</sup> and also specifies a fifth exclusive right—that of public exhibition not now explicitly recognized in the statute.

336. H.R. 2512, 90th Cong., 1st Sess. (1967).

337. COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 24 (1961).

Copyright may be thought of as a packet of cumulative and to some extent overlapping rights.<sup>338</sup> It is these five fundamental rights that represent a statement of what that packet consists of. Each of the rights may be subdivided indefinitely and each subdivision may be owned and enforced separately.<sup>339</sup>

Everything contained in section 106 is made "subject to sections 107 through 116,"<sup>340</sup> and must be read in conjunction with those sections which provide limitations,<sup>341</sup> availability and scope,<sup>342</sup> or outright exemptions<sup>343</sup> with respect to the copyright owner's exclusive rights. Thus, section 106(a) is intended to draw the broad bounds of copyright, and the ten sections that follow are intended to mark out its compass in particular situations and for particular kinds of works.<sup>344</sup> To take an example, "section 106(3) gives the copyright owner the exclusive right to lend copies of his work, but section 108 makes clear that, when a library has acquired ownership of a copy, it would

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338. "The preparation of a derivative work would usually also involve its reproduction, and hence the reproduction of the basic work, in copies or phonorecords." COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTAL REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 15 (1965).

339. These rights are set forth in chapter 2 of the new bill entitled "Copyright Ownership and Transfer." H.R. 2512, 90th Cong., 1st Sess. §§ 201 (ownership of copyright), 202 (ownership of copyright as distinct from ownership of material object), 203 (termination of transfers and licenses granted by the author), 204 (execution of transfers of copyright ownership), 205 (recording of transfers and other documents). These sections of the 1966 bill are discussed with examples. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 113-25 (1966); COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE COPYRIGHT LAW, 89th Cong., 1st Sess. 63-78 (1965).

340. H.R. 2512, 90th Cong., 1st Sess. (1967).

341. *Id.* §§ 107 (limitation on exclusive rights: fair use), 108 (limitation on exclusive rights: reproduction of works in archival collections), 109 (limitation on exclusive rights: effect of transfer of particular copy or phonorecord), 111(c) (limitation on exclusive rights: secondary transmissions), 112 (limitations on exclusive rights: ephemeral recordings).

342. *Id.* §§ 111(d) (limitation on exclusive rights: secondary transmissions), 113 (scope of exclusive rights in pictorial, graphic, and sculptural works), 114 (scope of exclusive rights in sound recordings), 115 (scope of exclusive rights in nondramatic musical works: compulsory license for making and distributing phonorecords), 116 (scope of exclusive rights in nondramatic musical works; public performance by means of coin-operated phonorecord players).

343. *Id.* §§ 110 (limitation on exclusive rights: exemption of certain performances and displays), 111(a) & (b) (limitation on exclusive rights: secondary transmissions).

344. H.R. REP. NO. 2237, 89 Cong., 2d Sess. 52 (1966); COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 15 (1965).

be free to lend that copy without any obligation to the copyright owner.”<sup>345</sup>

The exclusive rights given to a copyright owner are “to do and to authorize”<sup>346</sup> any of the activities covered by the packet of rights. Use of the phrase “and to authorize” is intended to avoid the problem of the liability of contributory infringers since the right “to do” could include the right “to authorize.” The example offered by the Committee is that of a person who legally acquires an authorized print of a motion picture.<sup>347</sup> If he then rents it to others for unauthorized public performance there can be no doubt that he is an infringer.

Copyright is regarded as a unique form of property.<sup>348</sup> The res to which the property right called copyright attaches—the intellectual creation of the author—is incapable of possession except as it is embodied in a tangible article, say a manuscript, but the owner maintains the intangible right to control its reproduction. After publication or disclosure “the tangible articles . . . may be in the possession of many persons other than the copyright owner, and they may use the work for their own enjoyment, but copyright restrains them from reproducing the work without the owner’s consent.”<sup>349</sup>

Mr. Justice Holmes gave the classic statement of copyright as property:

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now in vacuo, so to speak. It restrains the spontaniety of men, where, but for it, there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition

345. COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 15 (1965).

346. H.R. 2512, 90th Cong., 1st Sess. § 106 (1967), H.R. REP. NO. 2237, 89th Cong., 2d Sess. 5 (1966).

347. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 52 (1966).

348. The term property is said to extend to “that dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects.” BLACK’S LAW DICTIONARY 1382 (4th ed. 1951).

349. COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 3 (1961).

of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.<sup>350</sup>

*Authors.* The authors' interest, the interest most worthy and deserving of protection, urged adoption of section 107 of the 1965 bill.<sup>351</sup> While favoring the specific recognition of fair use they felt that any attempt to define the doctrine would be unwise.

The revision bill reaffirms the principle of "fair use" which has been created by court decisions over the last century. Quite properly, it does not attempt to prescribe specific rules or requirements. This cannot be done by statute. Fair use is a concept that has developed and worked successfully because of the flexibility possible under a process of judicial interpretation.<sup>352</sup>

For good reason the authors were vehemently against carving out special privileges in the Copyright Act which would permit uses of the author's work without consent or compensation.

[C]opyright is not a "monopoly,"<sup>353</sup> nor can the author be denied adequate protection on the claim that he is simply a

350. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908).

351. H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 & S. 1006, 89th Cong., 1st Sess. (1965).

352. *Hearing on H.R. 4347, H.R. 5680, H.R. 6831 & H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 91 (1965).

353. The monopoly claim would not justify special treatment:

It is claimed that copyright is a "monopoly" and, therefore, to protect the public interest it should be limited in duration, and in the rights granted. It is a specious argument which your committee has previously rejected (Rept. No. 1742, 87th Cong., 2d Sess.). At common law and under the Copyright Act, an author possesses exclusive rights to use something he has created—and nothing more. He is no more a monopolist—in the antitrust sense—than millions of other Americans who own land, buildings, oil wells, securities, stocks and bonds, automobiles, or other property. Each one possesses the exclusive rights to use that which he has created, purchased or inherited. This is property. It is not "monopoly", as the term is used under the Sherman Act. A monopoly exists when someone owns enough property or has enough economic power to control an industry or to prevent competition. The author of a novel controls only the rights to use it—not the publishing industry or the market in novels. His copyright does not give him the power to fix the price of all novels; his must compete in the marketplace with thousands of other copyrighted and uncopyrighted works.

*Id.* at 84.

applicant for "special privileges."<sup>354</sup> What is at stake are the rights an author is to have in something he created—a book, or play, or musical composition—that he brought into being and from which society will benefit. He is not asking for special privileges in public resources or facilities.<sup>355</sup>

The education interests, including the teachers and the libraries, had argued for such privileges.

Going to the heart of the author's position, the primary by-product of copyright is incentive and encouragement to continue the often unrewarding creative process. To grant special privileges would be to dilute the free enterprise system.

[A]n author who creates something of value is entitled to enjoy the fruits of his labor; that this is accomplished, in our society, by securing to him exclusive rights in his creation so that he may be paid when it is used; that by securing these rights we provide the incentive for independent literary creation; and that all of us—private citizens, education, the Government—will reap the benefits of the efforts, skill, and enterprise of those who are thus induced to create and produce.

We believe that where this principle of payments for property is violated, by appropriating and withholding an author's rights and by denying him compensation for uses

354. The authors debated the special privilege claim this way:

It is argued that copyright is only a special privilege granted by Congress to authors. And, that it must be restricted by limitations and exceptions that permit various free uses of a work, without its author's consent and compensation, because these serve the public interest. To support this argument it is claimed that the author has no fundamental claim to exclusive rights in the work he creates.

We disagree. The author does have a fundamental right to the full and adequate protection of his works. He needs that protection as a matter of economic necessity. And, the public interest in the creative arts requires that he have it.

At the outset, one fundamental fact should not be overlooked. What Congress is considering are the rights that an author will have in something he created—a book, or play or musical composition which he brought into being for the benefit of society. This is a far cry from granting a private citizen title over public resources (as was done in the land-grant acts), or from granting someone the exclusive privilege of using public facilities to conduct a business (as is done when the Government grants a license to operate an airline or a broadcasting station). The rights granted to an author are rights in a literary or artistic work that would never have existed but for his act of creation.

*Id.* at 84-85.

355. *Id.* at 96.

of his work, not only he, but society as a whole, is deprived of the benefits of his creative enterprise. If a work created by an author is valuable enough to be used, then he should not be expected to contribute it without payment.<sup>356</sup>

The authors cried that the privileges proposed by the educators "would have a devastating effect on American scholarship and publishing."<sup>357</sup> The reasons it would be so harmful were due largely to the new technology in copying.

Schools and school systems could prepare one, or a hundred, or 10,000 copies of any book, depending upon how many teachers required it. They could prepare their own textbooks and anthologies by copying substantial portions of several copyrighted works. Purchase of books for library and teaching use would be sharply curtailed. The economic danger of these proposed exceptions is a major threat. New means of copying and duplicating are proliferating at an amazing rate and their cost decreases continually. Even now they permit inexpensive and rapid reproduction of single copies or multiple copies of any work or a portion of a work. As the years pass, they revolutionize the publishing industry.<sup>358</sup>

The author's position has been poignantly summed up as follows:

American authors and publishers are an integral part of our educational system. The author contributes as much as a teacher who teaches from his book, and he is as much entitled to be paid for the use of his work in the teaching process.<sup>359</sup>

*Publishers.* The publishers, like the authors, heartily endorsed<sup>360</sup> the fair use provision of the 1965 bill since it left "the definition of fair use to the courts where it has rested since 1790."<sup>361</sup> "As a practical matter," the spokesman for the American Textbook Publishers Institute continued, "fair use can be

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356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 97.

360. *Id.* at 75.

361. *Id.*

determined only by consideration of the facts of the use.”<sup>362</sup>

The publishers opposed the educators’ request for a more detailed definition of fair use like that in the 1964 bill and in the 1965 amended version of section 107, arguing that such a provision would be unsuccessful. “No effort to spell out fair use by statute can cover all situations.”<sup>363</sup> Their argument continued in this manner:

It would raise a whole new set of undecided questions for courts to settle, and would lead of necessity to costly litigation. Until such questions were settled in the highest court, no one would know precisely what is fair use and what is not.

Further, the great virtue of the fair use doctrine is its flexibility, permitting ready application to novel situations as they arise. Any detailed expansion by statutory language would introduce elements of rigidity, inappropriate in a fast changing society.<sup>364</sup>

In the 1964 bill, section six attempted “to clarify the scope of the doctrine of fair use . . . without freezing or delimiting its application to new uses.”<sup>365</sup> This provision, substantially similar to the amended 1966 bill, was opposed by the author-publisher interests.<sup>366</sup> We have already seen that this was objected to by the educational organizations.<sup>367</sup> The fears expressed have caromed off the earlier bill onto the present draft.

The storm raged, as it did with the authors, over the educators’ proposals.<sup>368</sup> To the publishers such use would open wide the gates to free, uninhibited use of copyrighted materials in the schools.<sup>369</sup> The idea was that a foot in the door now could become a yard wide in the future.

We strongly object to the demand of the educators that they be permitted to make a single copy of an entire

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362. *Id.*

363. *Id.*

364. *Id.*

365. COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 27 (1965).

366. COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89th Cong., 1st Sess. 27 (1965).

367. See text at note 309 *supra*.

368. See *supra* note 353.

369. *Hearings on H.R. 4347, supra* note 304, pt. 1, at 146.

copyrighted work . . . . Such an act is violation of today's law and there is no good reason to change the substantive law in this respect. The fact is the permission to make single copies is the "open sesame" to the making of multiple copies . . . . [T]he point need not be labored that if teachers were to be permitted to copy copyrighted material (beyond the bounds of fair use), to that degree the author and publishers of such material would be hurt economically by diminished sales. Such a situation can lead only to noncreation and nonpublication of the materials which educators require.<sup>370</sup>

A subtle point is the subsidy issue. The publishers claim that education will not pay its own way in the event the copyright law stipulates payment for use.<sup>371</sup> In the public school system the burden would be shifted to the taxpayers; in the private school system the students or their parents would stand the expense. Therefore, this is viewed as an involuntary gratuity by the publishers and the authors.

[W]hy is it just for copyrighted works of authors to be taken by teachers without compensation? Of course, all of us want our children to have the best possible education. However, we do not expect the builder of a nonprofit school building to construct it at no charge, nor the furniture merchant to donate school furniture, nor the supplier of school supplies to give his products gratis. On what reasonable theory, then, can the creative writer and his publisher be expected in effect to donate books?<sup>372</sup>

On the equities of this subsidy Professor Nimmer says:

But if every schoolroom or library may by purchasing a single copy supply a demand for numerous copies through photocopying, mimeographing, or similar devices, the market for copyrighted educational materials would be almost completely obliterated. This could well discourage authors from creating works of a scientific or educational nature. If the "progress of science and the useful arts" is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is largely undercut in the name of fair use.<sup>373</sup>

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370. *Id.*

371. *Id.* at 140.

372. *Id.*

373. NIMMER, COPYRIGHT 653 (1964).



If this is to remain a free enterprise society, let the taxpayers pay the true cost of education, the publishers argue. Publishing is both a high cost and a high risk business. One high school textbook will take an investment cost of \$50,000 before the book is available for sale. Elementary school books coming in a series will cost as much as \$1 million before the first copy can be sold. The high risk results from the fact that there is no way to market-test the product in classrooms at various stages of development. The publisher-entrepreneur "cannot know the market response . . . until they are published."<sup>374</sup> The nature of the publishing industry should help explain why copyright is so important.<sup>375</sup>

*Libraries and Educational Institutions.* The libraries, universities and other institutions who in the United States have argued most forcefully for copying privileges and broad fair use provisions of one type or another can only be a small fraction of the number of establishments using copyrighted materials daily without permission. This silent and faceless mob numbers in the hundreds of thousands. It includes the corner grocery as well as the giants of industry and finance. However, the only real dialogue has been between the author-publisher interests and the educators and the libraries. The latter cannot be said to represent all users, and although there is cause to distinguish between educational and commercial usage, the difference does not lie in the profits or the lack thereof.

Here is a profile of the 1984 user:

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374. *Hearings on H.R. 4347, supra* note 304, pt. 1, at 72.

375. The reviewer of a meeting on photocopying pinpoints the problem.

The basic motives of private enterprise that inspire the scientist and machine producers also motivate the author and publisher. One major publisher of the U. S. indicated that 30% of his business is in the field of technology and science. The average number of copies per book in this field is 3800. If due to mass duplication the volume was materially reduced he would, out of economic necessity, have to stop printing those subjects. He stated that all the talk has been directed toward obtaining the machines or paper at a nominal cost in the interests of the free flow of information. Without an economic incentive the publishers as private businesses cannot underwrite the progress that flows from freely exchanged information would have to stop producing the originals from which copies are made. The author is similarly motivated. The well-spring of literary ideas that must find expression in writing would soon dry up if the author was not compensated, or subsidized since he would have to turn to other means of livelihood.

Kennedy, *Anatomy of a Symposium—A Review of the Meeting in Washington, May 20-23, 1903, on Photocopy*, 10 BULL. COPY. SOC. (1963). For the proposition that photocopying does not have a significant effect on publishing see Clarke, *The Impact of Photocopying on Scholarly Publishing*, 88 LAW LIBRARY J. 2625 (1963).

We are gradually working for the day when the searching for material requested by all students<sup>376</sup> can be done by the library staff. Once the student has on his desk Xerox copies of articles, books, et cetera, to supply his special question, then he must search for the pattern, the sense which emerges from the material arising under his pattern. Professional personnel search the material, present the student Xerox copies of articles, books, et cetera.<sup>377</sup>

The Toronto Public Library warns:

(Throw it away when you are through; don't lose the advantage of efficient retrieval in copying.) . . . With electronic storage and retrieval and photocopying systems available, every book in the library must earn valuable shelf space through literary analytic experience.<sup>378</sup>

What this library proposes to do constitutes copyright infringement unless its use falls within the recognized exception of fair use.<sup>379</sup> Like the willful and wanton infringer, a library supplying copies of whole books and articles, without the copyright owner's consent, would be using—even supplanting—someone else's property as the fundamental element of its service without paying for that property. For the proprietor's exclusive right to make and distribute copies of his work—be it one, two or twenty—is a property right. Such library duplication, though it sounds Orwellian, is close at hand. Reproduction without consent or compensation, carried to its logical conclusion, poses a serious threat to the livelihood and existence of the publisher and the author.

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376. It isn't clear from this description how a library is to tell the good guys, presumably the students, from the bad guys. Perhaps, by the time the program goes into effect all students will wear white levies or show a pure heart. What I am inferring is not so facetious. The "Student Status" for copyright purposes depends more on the type and the nature of the usage than whether the bearer flashes a student identification card.

377. 88 LAW LIBRARY J. 1121 (1963).

378. *Id.* The library of the future is discussed by Janeway, "The Toad Beneath the Harrow Knows . . ." 91 LAW LIBRARY J. 887, 888-89 (1966).

379. See generally, Clapp, *Library Photocopying and Copyright: Recent Developments*, 55 LAW LIBRARY J. 10 (1962); VARMER, PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES, STUDY NO. 15, PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, OF THE SENATE COMMITTEE ON THE JUDICIARY, 86th Cong., 2d Sess. 45 (1960); Smith, *The Copying of Literary Property in Library Collections* (pts. 1-2), 46 LAW LIBRARY J. 197 (1953), 47 LAW LIBRARY J. 204 (1954).

As a practical matter, publishers have not sued libraries for such copying even though there may be technical infringement present. The libraries have been warned though and the worm could turn.<sup>380</sup>

From the viewpoint of the user, here the library, it may be efficient and effective to cut back the number of copies it buys and hence has to shelve. But if payment must be made when the library substitutes Xerox<sup>381</sup> copies for printed copies, it would have had to purchase to service the reader's demands.

Where the library can afford to serve its readers more effectively, by distributing multiple copies, or readers can afford to pay for more effective service, the author and publisher are entitled to decide in what circumstances they can afford to authorize such duplication—and to be paid for the use of their work, by the library or the reader.<sup>382</sup>

380. A legal publisher phrased it this way:

The increasing prevalence of photographic and other reproductions of copyrighted material by libraries has been rather forcibly brought to our attention in recent years. Our investigation of the matter convinced us that this practice is not only a technical violation of copyright but in some instances—and certainly in the aggregate—may constitute a substantial impairment of our interests.

Perhaps our gravest concern is that we do not, by acquiescence in infringements of this kind, jeopardize our copyright and our right to continue protection against more substantial infringements by others.

These considerations led us to adopt a policy opposed to such reproduction of any part of our publications without our consent in each instance. We have had occasion to assert our rights in this respect, though fortunately a demand has sufficed so far without any need of legal proceedings.

Our decision on this matter was reached with great reluctance. We make every effort to cooperate with the libraries . . . . But the threat to our interests is so serious that we feel that no other course is open to us.

Letter from a law publisher, Aug. 8, 1957, *quoted in* Price, *Photocopying By Libraries of Copyrighted Material*, 5 BULL. COPY. SOC. 345, 345-46 (1958). No reported cases have been found, however.

381. We are mightily concerned over the misuse of our good name. Xerox is not only the name of our corporation, it is a registered trademark . . . . It is used as a verb; and, of course, this is an incorrect usage. One can indeed make 30 copies of something on a Xerox machine (correct usage), but one may not "Xerox 30 copies" . . . .

Use of the generic name for the process, e.g., ' . . . a single xerographic copy . . . ' or ' . . . a single xerox of the . . . ' is to be preferred. Both of these words are generic terms

I hope you can appreciate our concern inasmuch as to allow the misuse of our name without calling attention to it would mean that it ultimately would belong to the public just as does the word aspirin.

Letter from Fred Isley, Manager, Public Relations, Xerox Corporation, *quoted in* 91 LIBRARY J. 2740 (1966).

382. REPROGRAPHY AND COPYRIGHT LAW 80 (Hatter v. Bush ed. 1964).

Such a mutual arrangement can be devised.<sup>383</sup>

*Educators.* With these ideas in mind, we will examine the teachers' goals, knowing full well that their views cannot and should not be taken to represent the faceless users.<sup>384</sup> The educators deemed the copyright law apt to achieve three aims:

- 1) An automatic exemption for education to permit limited copying and reproduction of materials for purposes of teaching, study and/or research where no direct or indirect commercial advantage or other private gain is involved without reference to any clearinghouse or licensing system.
- 2) A clarification and delineation of the "fair use" doctrine because "fair use" by itself is not a sufficient guideline for the classroom teacher to know when copyrighted materials may or may not be used . . . .
- 3) A provision which would allow the waiver of statutory damages by the courts for innocent educational infringers and the transfer of the burden of proof to the copyright proprietor in "fair use" proceedings . . . .<sup>385</sup>

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383. Until this is done, here are three suggested safeguards for copying libraries.

- (1) Act in good faith and do not knowingly photocopy in a manner to injure the owner.
- (2) Build up a file of advance permissions from copyright owners and establish a central repository and information agency for them.
- (3) Explore the legal possibility and economic necessity of taking out liability insurance.

384. An illuminating and valuable report is Siebert, *Copyrights, Clearances, and Rights of Teachers In The New Educational Media*, AMERICAN COUNCIL ON EDUCATION (1965). See also *Copyrights, Clearances and Rights of Teachers In The New Educational Media*, AMERICAN COUNCIL ON EDUCATION (1963).

385. Wigren, *Education's Concerns in Copyright Law Revision*. EDUCATION AGE (Sept.-Oct. 1965). The President of the National Education Association, Lois V. Edinger, named seven objectives for high priority in the Associations' program.

1. Maximum learning opportunities for all: To contribute to maximum learning opportunities for each person—and to serve the national interest—by continuous assessment of curriculum content; and the development and testing of new concepts, procedures, and facilities which will result in creative instructional programs.
2. Time to teach: To assure staff members the opportunity to devote their professional competence to professional tasks in an environment conducive to learning.
3. Professional standards with autonomy and freedom: To develop, in the public interest and with public consent, the autonomy of the of the organized teaching profession in the determination of standards of competence and professional conduct.
4. Financial support: To achieve the enactment of Federal educational legislation which will produce funds required to meet the Nation's educational needs.

The President of the National Education Association spoke of being in the midst of an educational revolution, both in the areas of content and of methodology.

There are new curriculum developments in the major disciplines which are based on widespread change in curriculum materials. With the curriculum explosion facing us in every area and at every level in public education, class examination of all types and kinds of materials is a necessity if change is to occur at the practical level of classroom application. At best this is a difficult and complex enough problem . . . . The teacher must be free to teach and must have access to materials to do the job.<sup>386</sup>

A teacher's job then may include using copyrighted materials in the following ways: (1) One English teacher copies excerpts or paragraphs from novels and literature books for the entire class for the purpose of showing good examples of writing. (2) Another teacher dittoed some of T. S. Eliot's poems on a one-per-pupil basis for analysis. (3) Still a third English teacher uses a piece of poetry as a model for classroom exercises. She felt that if a student has his own copy to mark he learns much more than from merely reading a poem. (4) An American History teacher, in preparing tests, dittoed enough maps for the class. (5) A Social Studies teacher with the use of an opaque projector traced a map from a textbook for use as a program backdrop. (6) A Current Events teacher made a transparency of a chart showing population growth. (7) An Economics teacher used graphs and charts from the New York Times to study the stock market. (8) A History teacher used transparencies of newspaper articles to tie current events to history. (9) A guidance counselor copied an article on study habits for distribution

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5. Public understanding: To achieve public understanding of the role and needs of education and a reaffirmation of faith in public education.

6. Professional negotiations: To establish formal procedures by which professional organizations and governing agencies can reach agreement on conditions of work.

7. Strong professional association: To promote maximum development of dynamic, independent, professional associations at local, State, and National levels and to achieve unified membership.

*Hearings on H.R. 4347, supra* note 304, pt. 1, 381-82.

At least four of these objectives, number one, two, three and five, are directly served by the teacher's position on the copyright situation and the others are tangentially related.

386. *Hearings on H.R. 4347, supra* note 304, pt. 1, at 381.

to 150 students. (10) Another guidance counselor prepared a ditto master of a college application to show students how to fill it out.<sup>387</sup>

These are but a few of the classroom uses that teachers have in mind when they speak of receiving an automatic exemption. The combinations and permutations are endless.<sup>388</sup> The teachers proposed to add a new section 111 entitled "Limitations on Exclusive Rights: Educational Copies and Recordings":

Notwithstanding the provisions of Sec. 106, it is not an infringement of copyright for anyone lawfully entitled under Sec. 109 to perform, exhibit, or to transmit a performance or exhibition of, a copyrighted work (save those originally consumable upon use, such as workbook exercises, problems, or answer sheets for standardized tests)

- (a) to make no more than one copy or phonorecord of the work in the course of such use, provided that no copy or phonorecord may be made of dramatic works (including any accompanying music), pantomimes and choreographic works, and motion pictures or filmstrips unless the performers and the audience are limited to students, faculty, or staff, and
- (b) to make a reasonable number of copies of phonorecords of excerpts or quotations from the work, provided that such excerpts or quotations are not substantial in length in proportion to their source,

solely for purposes of such person's or organization's own teaching, lawful performances, exhibitions and transmissions, for course work study in connection therewith, for research or for archival purposes, provided that no such copyrighted material is sold or leased for profit and that no direct or indirect private gain is involved.<sup>389</sup>

The case for the education interests is two-phased, one ideological and the other pragmatic. On the ideological side they argue that the purpose of the copyright law is to promote the useful arts and sciences. Nothing is more important in pro-

387. *Id.* at 383-84. See also *id.* at 318-19, 335-366, 408-09.

388. An instructive lesson is taken from the possible uses of a map of Africa, taken from the cover of the *San Francisco Chronicle* of January 31, 1965. *Id.* at 411-12. A trenchant analysis of this example under present law, present practice H.R. 4347 and education's proposals is found at *id.*, pt. 3, at 1770-87.

389. *Id.*, pt. 1, at 339.

moting the arts and sciences than giving the teachers the tools needed to inform and instruct. Everyone agrees on the importance of education to all our people and to the future of the nation. Therefore, anything that helps those engaged in education perform their vital role in our society is in the public interest and ought to be considered most carefully and favorably by Congress. The proposals advanced,<sup>390</sup> the educators continue, would supply the classroom teacher with what he needs to do his job in the best way possible. The recommended proposals would provide the right to use copyrighted material for teaching and learning purposes, without the unnecessary delays arising from the need for copyright clearances and the payment of royalties.

The educators urge, therefore, that the progress of the arts and sciences will best be served if teachers have a wide range of freedom in copying copyrighted materials for use in their teaching activities without having either to ask the copyright owner for permission or to pay the owner royalty for such copying.

Similarly, the burden of proof<sup>391</sup> in any action for infringement should be placed upon the copyright proprietor rather than the teacher, say the educators, so as not to discourage teachers from performing their obligation to our youth by making use of copyrighted materials when necessary. Presumably, teachers would more often hesitate to use these materials if they had the burden of proving the use to be "fair" in an infringement action.<sup>392</sup>

On the pragmatic side the educators believe that adoption of their proposals is necessary and feasible for three reasons. First, if fair use is not more precisely defined, the teacher may be innocently ensnared in lawsuits or be frightened from doing what they are in fact permitted to do under the common

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390. See *id.* at 357-59. These proposals are commented on in *id.* at 338-57.

391. See *id.* at 346.

392. While the educators agree on including fair use in the statute, they believe that section 107 should be amended to read as follows:

Notwithstanding the provisions of section 106, the fair use of a copyright work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. Noncommercial educational use by a nonprofit educational institution or organization shall be presumed to be such "fair use" unless specifically rebutted.

*Id.* at 346.

law fair use concept. They claim that the 1965 bill's fair use provision,

fails to give either clarity or certainty and must be decided on a case-by-case basis, *after* the teachers use the materials and not before. "Fair use" gives teachers and scholars no assurance of *when* copyrighted materials may be copied, nor *how much*, nor under *what* specific conditions. . . . The bill might well result in a lawyer's paradise by its inducement to lawsuits.<sup>393</sup>

Unless fair use is more specifically defined, a teacher will have to contact an attorney each time he wants to use some copyrighted teaching material.

It is unconscionable to foist off on the classroom teacher the daily requirement of a legal determination on what has been called "the most troublesome [question] in the whole law of copyright." Teachers have a right to look to congress for clarity and certainty on this subject . . . all the more so because the burden of proof is on the teacher. . . . Without an *automatic* exemption . . . fair use might well become a snare and a delusion to teachers.<sup>394</sup>

Since no one knows precisely what the scope and limits of the fair use doctrine are, a blanket exemption for teaching and scholarship would provide a definite standard plus a deserved advantage for those involved in American education.

Second, such an exemption for teacher would not in the long run damage sales and profits of authors and publishers, but would increase them. The educators contend that limited copying by teachers will help them to disseminate the writings of authors and poets more widely, and thus the students will be led to pursue those writers that have aroused their interest and will eventually obtain more published material by the author at a good price. Therefore, the educators suggest, the publishers will in fact be economically benefitted if the teachers' proposals are adopted in the new copyright law.

Finally, some educators frankly state that "anything less than requested . . . for restricted educational copies . . . would be unenforceable in fact and become a dead letter."<sup>395</sup> This can be

393. *Id.* at 342.

394. *Id.* at 344.

395. *Id.* at 340.



viewed either as a threat to disregard the law if Congress refuses to succumb to their wishes or a considered opinion that teachers will refuse to obey any law that requires for the most part self-enforcement.

In the final analysis the user's case for broad statutory fair use—whether teachers or brokers—boils down to four points: (1) a more effective and more inclusive accomplishment of the longstanding constitutional policy, (2) a clarification of ambiguities so that users may readily know what they can legally use, (3) a logical and reasonable extension of presently available rights to make effective use possible, (4) a recognition of the primacy of the public interest so that where the copyright owner's interest conflicts with those of the public, the public interest must prevail.

And, in the main, three arguments are presented against this position of expansion: (1) There will be a deprivation of property rights. (2) The common law fair use doctrine can take care of all reasonable needs. (3) The copyright owners will be destroyed.

*The Copy Machine Industry.* Much of the controversy going on today over copyright is due to the technological advancements being made in the copying machine industry.<sup>396</sup> As far as the interests of the industry are concerned it is not certain that they can be clearly defined or that they are clearly known. The business of copying is only a segment of the communications field and the copy machine is but one of many communications products.<sup>397</sup> The giant, Xerox Corporation, is deeply involved in the field of communications, both as a manufacturer of copy-

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396. After World War II photoduplication was still in its infancy. Today, there are nearly two hundred types of copying machines that use chemicals, heat or electrostatic methods of operation. Costs of copying range from three cents to ten cents per page. It is estimated that there are approximately 800,000,000 pages of copy made each month, of which five percent consists of materials under copyright protection. It can thus be seen that machine duplication though still in its infancy bears considerably upon the interests of copyright owners. The executive vice-president of Xerox Corp. reported to the Los Angeles Society of Financial Analysts on June 3, 1965, as follows:

As to the total copying market, its growth also continues at a rapid pace. In 1964, roughly 9½ billion copies were produced in this country, resulting in total income for the industry of about \$500 million. By 1969, I'd guess that some 25 billion impressions will be made by copiers. And the "information explosion" will still be accelerating.

*Id.*, pt. 3, at 1430.

397. See the letter from Mr. J. C. Wilson, President, Xerox Corp. to Mr. Herbert Fuchs, dated Sept. 24, 1965. *Id.* at 1930.

ing equipment and as a publisher of books and other educational materials.<sup>398</sup>

Readers have always felt free to copy by hand from the works of others for their own infinite variety of personal reasons. It has become almost as commonplace for copy machines to do for a reader what he has always been doing and what he has taken without question as customary practice,<sup>399</sup> except that copy machines make the process speedy and convenient. The natural outgrowth has been that a man who previously would copy two or three sentences from a book to make personal notes would now copy the whole article or the whole chapter from a book. Moreover, rather than tell his friends of the better mousetrap so that they may beat a path to the door, he'll give them a copy.<sup>400</sup> This is the most deleterious effect of the new copying technology.

Some of the reasons why wholesale copying has become a way of life are: (1) There is a vast amount of information available today in printed form and a galloping rate at which it is proliferating and obsoleting yesterday's child. (2) There is a driving need to absorb ideas and knowledge and look for the latest word on a subject. (3) There is an increasing need for rapid, even instantaneous information dissemination that makes delay intolerable. (4) It is more efficient and time saving to get a copy of printed material at a reasonable cost than it is to write the piece out in longhand. (5) The public library is no longer the sole, static source of written material.

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398. The Xerox Corporation made good on a promise made by Joseph C. Wilson, president, at the annual meeting on May 13. It entered the field of education in a big way. A joint announcement from Wesleyan University, of Middletown, Connecticut, and Xerox said that Xerox had purchased American Education Publication and Wesleyan University Press, Inc., for 400,000 shares of Xerox common. Based on present market levels the transaction would be worth about \$56 million. In return for its shares Xerox takes over what was described as the largest educational periodical publishing enterprise in the world. Mr. Wilson, who is President of Xerox, said that recent acquisitions, including University Microfilms and Basic Systems, plus others to be announced in the next few months, only prove the great opportunities that have opened in the field of education and industrial training. *New York Times*, May 22, 1965, at 35.

399. This has been assumed without legal authority. The fact that the gentlemen's agreement seems to acquiesce, *see* text at note 280 *supra*, is not decisive; it dates back thirty-two years to a time when photocopies capable of wholesale copying were not available.

400. As a matter of interest, a case, of doubtful authority, held that copying violates copyright if the defendant circulates the copy. *Nicols v. Pitman*, 53 L.J. Ch. 552 (1884).

The issue is at once apparent. In the public interest, works that contribute to the advancement of our society in the arts and sciences must be disseminated rapidly. There must be a free flow of communication. At the same time, the copyright owners of these materials must be protected economically or else there will eventually be no original materials from which copies can be made.

New photographic materials are being developed and new copying devices and advanced techniques and products are far beyond anything we've seen yet.<sup>401</sup> Someday there will be bookless libraries. It will be easier to acquire and make a copy tomorrow than it is today. Looking into the murky crystal ball, the President's Science Advisory Committee predicted the final fall of Johannes Gutenberg:

The growth of published information has fostered the invention of many new handling and searching techniques and concepts. Best known are the retrieval systems based on automatic machinery. In addition, there are imaginative new ways of listing titles; for example, permuted titles, of gaining access to literature (citation indexes), of preparing abstracts or translations (by machine), of compacting the physical size of the record (microfilm and microfiches), of duplicating printed material.

The invention of the new retrieval methods is beginning to affect our traditional modes of communication. The traditional forms of the book, journal, and reprint may eventually give way to the machine storage of graphical and digital information and machine-generated copy. The technical publishing business may gradually be transformed into the *information handling* business in which the printing press as a means of mass production of identical documents no longer plays a dominant role.<sup>402</sup>

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401. Presently there are prototypes or, in development, machines that reproduce complete books from one original or from data fed into the machine. Libraries will no longer have to stock their shelves. Hard cover books, as they are now known, may well become collectors' items. It is envisioned that when a person wants a book, he will dial his request on a machine at his place of business or home. This information is relayed by telephone lines to a central information storage center. From there data is fed back over the same lines to the machine. This machine in turn reproduces and presents to the person the complete book or documents desired.

402. PRESIDENT'S SCIENCE ADVISORY COMMITTEE, SCIENCE, GOVERNMENT AND INFORMATION 20-21 (Jan. 10, 1963).

The picture as to the future of copying technology is clear; all signs point to continued progress. Research and development is aimed at improving present methods while devising new methods. This part of the communications market continues to grow like Topsey. Annually it is a quarter of a billion dollar a year industry and for the last six years has grown at a rate of 20 percent per year.<sup>403</sup> According to one documentation expert, "while this rate of increase is not likely to continue indefinitely, nonetheless the copying field is now so highly competitive that to capture any substantial portion of the market much effort is being expended to achieve the primary goals of making photocopying faster, easier, better, and cheaper."<sup>404</sup> Until we reach the point of satiation as copying becomes cheaper, the volume of copying will continue to grow.<sup>405</sup>

With the advent of simpler, faster, better, and most of all, cheaper machines, strategically placed in prime public traffic spots, the measure of control over copying that at one time prevailed has gone by the boards. Where microfilm may have been used originally to supply a single copy for research purposes in place of manual transcription, any number of additional unauthorized copies can now be made with the new machines. Is there any economic damage involved in these practices?

A comprehensive study was performed by George Fry and Associates who were retained by the National Science Foundation to ascertain the nature of certain types of documentation practices on certain types of scholarly and scientific publications.

403. Hawken, *Reprographic Technology: Present and Future* in *REPROGRAPHIC AND COPYRIGHT LAW*, 39, 49 (Hattery & Bush ed. 1964).

404. *Id.*

405. In library after library, where Xerox 914 machines have been installed, the volume of copying has skyrocketed. I will cite two examples. A large university library installed a 914 machine to provide a faster and cheaper while-you-wait copying service. Up to that time, they had been using DTR and Verifax at 25 cents per copy. Soon after the 914 machine was installed, the popularity of this service at 15 cents per copy was so great that this branch of the photographic service had to extend its hours to remain open in the evenings and on Saturdays. These measures, however, were still not enough to satiate the demand for photocopies and the photographic service then had to acquire a second 914 machine and is still obliged to operate extended hours. The second example is from an institution in Washington that, for some years, provided a photostat service. In 1960, 4,341 documents were photostated. The institution then put in a Xerox 914 service. By the end of 1962, the use of the photostat service had dropped to 634 copies. But, in that year, 58,000 documents were copied on Xerox 914's.

*Id.* at 48-49.

The same author discusses the past and present reprographic processes including DTR, Verifax, photostat and Xerox in layman's terms, *Id.* at 39-48.

The group concluded that "there is no economic damage to the author group and that . . . the author actually considers dissemination through photoduplication an advantage to him."<sup>406</sup> This is a pernicious conclusion which the findings do not support. To assume its validity is to say that the scholar has no interest, commercial or otherwise, other than to attain the widest audience possible in whatever manner possible—that he is not interested in a dimension beyond the library shelf. Perhaps, the point to be made is that the scholar has a deeper interest in protection through copyright since the nature of his craft is subtly different from that of the author who reaches a wider reader group.<sup>407</sup>

As a rebuttal to the Fry findings it is worthwhile to hear out the President of the Authors Guild.

We do create these books and stories and poems and they would not exist without us. True, we create them because we hope other people will be moved by them or amused, excited or interested. They are not only for our own pleasure but the claim we make for them is that we made them.<sup>408</sup>

There are four kinds of damage that the publisher can sustain. The first is damage to circulation or sales, the second is damage to goodwill, the third is damage to reprint and back issue sales, and the fourth is damage to advertising.

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406. Koephe, *Assessment of Documentation Practices in Reprography in REPROGRAPHY AND COPYRIGHT LAW* 50, 57 (Hattery & Bush ed. 1964).

407. An author discussed the potential impact upon writers of the technological revolution that is taking place in publishing and library service.

Now, there are some writers to whom library sales are not very important, because they sell 100,000 copies of a novel about the sexual side of the Nobel Prize right hot off the griddle; and then they sell 500,000 copies in paperbacks, and if it looks as though they'll get up past the million mark, somebody makes a pilot for a television series to compete with *Peyton Place*. Some of these writers are members of the Authors Guild and they need protection on matters of copyright just as much as anyone else, and on censorship and taxes they need rather more. I am all for them. But they do not come into this question much—at any rate as yet. No, the people who will be hurt most by losing library sales are authors of serious books, many of them scholarly, many of them expensive . . . . What is going to happen to the authors of them if it isn't worthwhile for a publisher to print these books because he can't see a big enough sale for them?

Janeway, "The Toad Beneath the Harrow Knows . . ." 91 LIBRARY J. 887, 889 (1966).

408. *Hearings on H.R. 4347*, *supra* note 304, pt. 1, at 99-100.

Economic damage does exist, but it would be specious at best to attempt to estimate the extent of the harm. It suffices to be aware of the fact that artificially drying up demand with photocopies is done at the expense and loss of the copyright holder.

*B. The Proposed Optimum Solution.*

This proposal covers four fronts: the doctrine of fair use; the statutory licensing system with a private clearing house; the author's moral rights; and the broad matter of educating the public.

To defile the common law doctrine of fair use by making it a statutory imperative is to tinker with the judicial process. The user's hue and cry has been to broaden the doctrine while the copyright holders oppose this. This reaction is only natural, but it doesn't deal with the real question which is simply, to copy or not to copy.

It is argued above that to recognize fair use in a statute by spelling out factors or by offering a definition or examples as the 1966 version suggests only leads us deeper into the uncleared thicket. The doctrine has built-in pitfalls and obstacles that are best left to the courts. Therefore, the Congress should respond with silence.

The next stage of overhauling the copyright law is to install an economically realistic method of meeting the competition from copying. We may say that the various copyright interest groups are all ultimately concerned with benefit to their self interest. If we sift through their various parochial attitudes and interests we find that they can be classed into two groups:

that of the goose which lays the golden eggs, and her assistants; and that of the consumers of the eggs, and their friends and assistants. Since these are intellectual eggs they are, of course, intellectually and spiritually edible. Those who produce the golden eggs of intellectual creativity want protection and encouragement to lay. Those who are nourished by the intellectual feast want freedom to consume. While some consumers recognize that productive geese must be fed and tended, most are aware only of the eggs—and only after these are so accessible as to seem free—i.e., in the public domain. Users in small quantities often tend to confuse free physical access with free economic access. Once

the prototype egg is laid, they may rationalize, what unfairness is there in making a little more use of it, say, by making a personal copy?<sup>409</sup>

Before the advent of the new technology, the copyright statute and certain natural limitations of hand copying produced an effective control over proliferation. Today, however, the user can amplify the number of replicas to suit himself, without consulting the copyright holder. There is little chance that an infringer can be caught, and the effect of infringement can only be detected by the impact on sales. The areas such as research where the user has sought to enhance his new status are less evident economically to the copyright holder than they are profitable and competitive to the pirate. The final paradox is that the payment of royalties has not kept pace with the use of copyrighted material.

The only way to attain a dynamic balance between the two main factions, the producers and the consumers, and still maintain a free enterprise system is to restore the equality of the two parts of the creativity cycle. The solution most likely to succeed in the restoration of a system which essentially is economic is that of a compulsory license and a clearinghouse for copyright.

A statute should be enacted to provide that once the copyright owner of a literary work has permitted its use in published form, anyone else may make a copy of the work upon notifying the copyright holder and paying a specified royalty. A compulsory system will work, escaping the Promethian chains of a voluntary approach in a fashion similar to that used in making phonograph records of musical works. Likewise, the clearinghouse works similar to ASCAP, like a switching system, passing rights to make copies to the users and passing royalties to the copyright holders. The essential details of the clearinghouse operation as well as the licensing provision have been discussed in detail above. It would not be enlightening to go into more detail here. Let it only be said that the thorniest issue is that of setting a royalty rate or rates. It would appear reasonable, however, in light of the discussion above to lump all users together under one fee schedule without having a preferential regard for any particular user. This arrangement would carefully correct the

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409. *Id.*, pt. 3, at 1472.

wanderings we saw in the clearinghouse proposed by the Committee to Investigate Copyright Problems.<sup>410</sup>

It has been said that the moral right of the author to protect his artistic reputation or personal rights vis-a-vis the property right aspect of his copyright is not adequately protected under copyright law in the United States.<sup>411</sup> In this country the doctrine of moral rights as such, or a statutory substitute, is not recognized as the basis for safeguarding the personal rights of authors.<sup>412</sup> According to continental views, copyright has two facets: "the property rights which are objects of commerce and which terminate after the period fixed by law; and the moral right which is inalienably attached to the person of the author and, depending on the particular theory, may or may not survive the property right aspects of the copyright."<sup>413</sup>

The author's moral rights have been recognized within the scope of the doctrine of libel,<sup>414</sup> unfair competition,<sup>415</sup> right of privacy<sup>416</sup> and general principles of equity jurisprudence.<sup>417</sup>

410. See text at note 295 *supra*.

411. Stevenson, *Moral Right and the Common Law: A Proposal*, 6 COPY-RIGHT L. SYMPOSIUM 89 (1955); Katz, *The Doctrine of Moral Right and American Copyright Law—a Proposal*, 24 SO. CAL. L. REV. 375 (1951); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, Creators*, 53 HARV. L. REV. 554 (1950); LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 581 (1938).

412. It has been pointed out that:

The alleged nonexistence of protection of the author's moral right has been considered one of the principal obstacles to adherence by the United States to the Berne and Washington Copyright Conventions, both of which contain provisions for the protection of the rights of the author to claim authorship in his work and to prevent others from interfering with its integrity.

Strauss, *The Moral Right of the Author*, COPYRIGHT LAW REVISION, STUDY NO. 4, PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, OF THE SENATE COMMITTEE ON THE JUDICIARY, 86th Cong., 2d Sess. 115 (1959).

413.—Strauss, *The Moral Right of the Author*, COPYRIGHT LAW REVISION, STUDY NO. 4, PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE FOR THE JUDICIARY, 86th Cong., 2d Sess. 115 (1959).

414. See, e.g., *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 167 N.E. 432 (1929). See also *D'Altomonte v. N. Y. Herald Co.*, 154 App. Div. 453, 139 N.Y. Supp. 200, *modified and aff'd mem.*, 208 N.Y. 596, 102 N.E. 1101 (1913); *Gershwin v. Ethical Pub. Co.*, 166 Misc. 39, 1 N.Y.S.2d 904 (City Ct. N.Y. 1937).

415. See *Proutz v. NBC*, 26 F. Supp. 265 (D. Mass. 1939); *Fisher v. Star Co.*, 231 N.Y. 414, 132 N.E. 133 (1921).

416. See *Packard v. Fox Film Corp.*, 207 App. Div. 311, 202 N.Y. Supp. 164 (1923). See also *Eliot v. Jones*, 66 Misc. 95, 120 N.Y. Supp. 989 (Sup. Ct. 1910).

417. See *Drummond v. Altemus*, 60 F. 338 (C.C.E.D. Pa. 1894). See also, CARDOZO, *THE GROWTH OF THE LAW* 68-70 (1924).



For purposes of analysis it will be helpful to divide the doctrine into its seven components:<sup>418</sup> (1) The right of paternity,<sup>419</sup> (2) the right to the integrity of the work,<sup>420</sup> (3) the right to create a work,<sup>421</sup> (4) the right to publish or not to publish,<sup>422</sup> (5) the right to withdraw the work from circulation,<sup>423</sup> (6) the right to prevent excessive criticism,<sup>424</sup> and (7) the right to relief from any other violation of the author's personal rights.<sup>425</sup>

418. The divisions to follow seem to be an extension of the main specific rights of paternity and integrity and to create and includes the lesser rights, such as a right to be protected from excessive criticism. The classification is set forth by STRAUSS, *THE MORAL RIGHT OF THE AUTHOR, COPYRIGHT LAW REVISION, STUDY NO. 4, PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY*, 86th Cong., 2d Sess. 115, 128-29 (1959).

419. See *Clemens v. Press Pub. Co.*, 67 Misc. 183, 122 N.Y. Supp. 206 (Sup. Ct. 1910); *Ellis v. Hurst*, 66 Misc. 235, 121 N.Y. Supp. 438 (Sup. Ct. 1910); *Neyland v. Home Pattern Co.*, 65 F.2d 363 (2d Cir. 1933); *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952); *DeBekker v. Stokes*, 168 App. Div. 452, 153 N.Y. Supp. 1066 (1915); *aff'd mem.*, 219 N.Y. 573, 114 N.E. 1064 (1916); *D'Altomonte v. N.Y. Herald Co.*, 208 N.Y. 596, 102 N.E. 1101 (1913), *modifying* 154 App. Div. 453 (1913); *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947); *Suzy Products v. Greeman*, 140 N.Y.S.2d 904 (Sup. Ct. 1955); *Harms v. Tops Music Enterprises*, 160 F. Supp. 77 (S.D. Cal. 1958).

420. *De Bekker v. Stokes*, 168 App. Div. 452, 153 N.Y. Supp. 1066 (1915), *aff'd mem.*, 219 N.Y. 573, 114 N.E. 1064 (1916); *Curwood v. Affiliated Distributors*, 283 F. 219 (D.C.S.D. N.Y. 1922); *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952); *Royle v. Dillingham*, 53 Misc. 383, 104 N.Y.S. 783 (Sup. Ct. 1907); *Drummond v. Altemus*, 60 F. 338 (C.C.E.D. Pa. 1894); *Proutz v. NBC*, 26 F. Supp. 265 (D. Mass. 1939); *Meliodon v. School District of Philadelphia*, 328 Pa. 457, 195 A. 905 (1938); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (1949); *Seroff v. Simon & Schuster*, 6 Misc. 2d 383, 162 N.Y.S.2d 770 (Sup. Ct. 1957).

421. *Roller v. Weigle*, 261 F. 250 (D.C. Cir. 1919); *Harms v. Stern*, 229 F. 42 (2d Cir. 1916); *Duff v. Russell*, 133 N.Y. 678, 31 N.E. 622 (1892); *Cincinnati Exhibition Co. v. Marsans*, 216 F. 269 (E.D. Mo. 1914); *Shubert Theatrical Co. v. Rath*, 271 F. 827 (2d Cir. 1921); *Assoc. Newspapers v. Phillips*, 294 F. 845 (2d Cir. 1923); *Erikson v. Hawley*, 12 F.2d 491 (D.C. Cir. 1926).

422. See *Wheaton v. Peters*, 8 Pet. 591 (1834). The *personal* rights of the author are not affected and are enforceable whether or not the work is published or under statutory copyright. See *Pushman v. New York Graphic Society*, 287 N.Y. 302, 39 N.E.2d 249 (1942). See also, *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); *Grigsly v. Breckenridge*, 65 Ky. 480 (1867); *State ex rel. Clemens v. Witthaus*, 228 S.W.2d 4 (Mo. 1950). The right to publish includes the right to refrain from publishing, *Wallace v. Georgia C. & N. Ry.*, 94 Ga. 732, 22 S.E. 579 (1894).

423. See *Chamberlain v. Feldman*, 300 N.Y. 135, 84 N.Y.S.2d 713, 89 N.E.2d 863 (Sup. Ct. 1949).

424. See, *State v. Haffer*, 94 Wash. 136, 162 P. 45 (1917); *Berg v. Printers Ink Pub. Co.*, 54 F. Supp. 795 (S.D.N.Y. 1943), *aff'd mem.*, 141 F.2d 1022 (2d Cir. 1944). See also, *Battersby v. Collier*, 34 App. Div. 347 54 N.Y.S. 363 (1898). *Shapiro, Bernstein & Co. v. Collier*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934).

425. See *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938); *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942); *Neyland v. Home Pattern Co.*, 65 F.2d 363 (2d Cir. 1933); *Shostakovich v. Twentieth-Century Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948) *aff'd mem.*, 275 App. Div. 692, 87 N.Y.S.2d 430 (1949); *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952).

Any calculus of moral rights must take each of these groups into account.

A frank recognition of moral rights would not, however, be new to the law, since the various aspects of the doctrine keep recurring no matter how stoutly it is asserted that this doctrine is an idiosyncrasy of the civil law.<sup>426</sup> The essential issue is not whether we should protect moral rights, but to what extent it is advisable to recognize the interests of authors independently of the general principles that have thus far been applied in the cases. The need is especially strong in the face of this copying revolution which is threatening to destroy the author entirely. This militates in favor of our recognizing the doctrine of moral right and adopting it to our legal system. This is a problem for Congress and not the courts. Suggestions for an American moral right doctrine have been abundant.

## VI. SUMMARY

After a quick look at the origin of copyright in America, we considered the basis and objective of copyright, which is to stimulate creation "by securing for limited times to authors . . . the exclusive right to their . . . Writings."<sup>427</sup> We learned that this exclusive right has "at all times and in all countries"<sup>428</sup> been subject to what is commonly referred to as a fair use by someone other than the copyright owner. We said that the question of fair use arises only after the court has determined whether there has been an infringement; and if there has, then, whether it is privileged under the doctrine of fair use.<sup>429</sup> We discussed the background of fair use, the rationale for the doctrine and the types of use recognized. We examined the nine factors the courts weigh in determining whether a use is fair.

426. See *Paramount Pictures, Inc. v. Leeder Press, Inc.*, 106 F.2d 229 (10th Cir. 1939).

427. U. S. CONST. art. I, § 8.

428. *Farmer v. Calvert Lithographing, Co.*, 8 F. Cas. 1022, 1026 (No. 4,651) (C.C.E.D. Mich. 1872).

429. Cohen puts it this way:

It is only when the preliminary questions: is the material copyrightable? Was it copyrighted? was it copied? and was enough copied to satisfy the "substantial appropriation" doctrine and to make the *de minimus* doctrine inapplicable? have been answered in the affirmative, that the question of whether there has been a fair use arises.

Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMPOSIUM 43, 47 (1955).

We took a longer Olympian look at the available public and private measures for ordering the protection, and the practices which meet the needs for copies without infringing upon the rights of authors or their successors or assigns. We summarized some of the past efforts to solve the problem and touched on the current program for Copyright Law Revision.

We ended by asking the usual question: What can be done to improve the situation? We suggested that a provision be added to the Copyright Act establishing a statutory licensing system with a private clearinghouse. Our underlying assumption, fairly arrived at after viewing the interests of the parties, was that all users be treated alike. We ended by suggesting the need for an American moral right doctrine. The suggested measures would provide a just and workable solution to the problems posed by the advent of the copying revolution and eliminate any concern that arises over the fair use doctrine.

## VII. EPITAPH FOR FAIR USE

It seems to me that the major problem is the reproduction of periodical literature by means of the Xerox machine. Since this activity is almost completely undetectable, I have absolutely no confidence that any method of undertaking to collect royalties for such reproduction will be successful, whether it is the voluntary approach proposed by CICIP or the statute . . . suggest[ed] imposing [a] compulsory license.

I feel that, as a practical matter, we will have to suffer through with the present system until fully computerized libraries are in use. Then, complete enjoyment of copyright protection will come into flower. I expect that, with new systems, access to copyrighted literature generally will be secured through a machine system in the first instance. Under those circumstances, a charge can be imposed for such access since the use of the literature in that manner always is identified. It is entirely possible that different charges can be imposed for transient viewing on a cathode ray tube display and for the delivery of hard copies. Of course, there would be a lack of control, similar to that experienced now, over reproduction of hard copies received from such a system. If the charges for access to the literature are sufficiently low, there will be relatively little incentive to reproduce hard copy received from the system.

In such an environment, I suspect that there would be little vitality left in the fair use doctrine. In the normal case, it would be appropriate for the user confronted with a charge for access to undertake to persuade the system operator to waive the charge because the material is required for a "fair use." Assuming that the charges will be relatively low and desire for immediate access will be predominant, reliance upon the fair use privilege would be of little economic advantage and would impose delay and inconvenience in an effort to persuade the system operator of its applicability.<sup>430</sup>

430. Letter from Roy N. Freed to Hugh J. Crossland. The penetrating and provocative comments of reprography expert *extraordinaire* Roy N. Freed on this manuscript epitomize beautifully my own Monday morning quarterbacking.